Central Law Journal.

ST. LOUIS, MO., JANUARY 5, 1900.

In a recent issue, we made mention editorially, of the movement inaugurated by the American Bar Association, at its last meeting, having for its object the celebration of the centennial anniversary of John Marshall's appointment as Chief Justice of the United States Supreme Court. 49 Cent. L. J. 279. The movement has met with universal approval among members of the bar in all parts of the country, and it is sincerely to be hoped that such recognition will be given "John Marshall Day" as befits the cherished memory and exalted reputation of the great chief justice. At the meeting of the American Bar Association a committee of fifty was authorized by the association to be appointed by the president to arrange for some appropriate celebration of the day—February 4, 1901. The president in conformity with this expressed desire of the association appointed a committee consisting of one from each State and territory which was represented in the American Bar Association, and made William Wirt Howe, of New Orleans, La., the chairman of the committee. The member for Missouri is Selden P. Spencer, St. Louis.

Following the action of the American Bar Association, the president of the St. Louis Bar Association has appointed as its committee for the same object, Hon. Amos M. Thayer, Hon. Elmer B. Adams, Hon. Jacob Klein, Hon. Daniel D. Fisher and Hon. Horatio D. Wood. The president of the Kansas City Bar Association has appointed from its number, Hon. Gardiner Lathrop, Mr. Arthur F. Evans and Mr. A. N. Gossett. The president of the Missouri Bar Association has appointed as the committee of that organization, Selden P. Spencer. St. Louis, chairman; J. McD. Trimble, Kansas City; T. R. Morrow, Kansas City; Hon. J. L. Minnis, Carrollton; James Hagerman, St. Louis; James L. Blair, St. Louis; L. R. Wilfley, St. Louis, Judge Henry W. Bond, St. Louis; Hon. R. F. Walker, St. Louis; A. H. Waller, Moberly; Hon. Paul B. Moore, Jefferson City. We trust that committees appointed for the various States are moving in this matter, and if lists of such committees are sent to us we shall be glad to publish same.

The opinion of the Court of Appeals of New York in the case of Marden v. Dorthy, which we publish in full on page 2 of this issue, is well worthy of careful study. It is said that no decision of recent years in New York has caused as much discussion and comment, because of the fact that it involves new applications of law, and directly affects investment institutions, savings banks, insurance companies and investors generally, who seem to be at a loss to escape from its effect. The facts of the case were that the owner of property was induced by artifice to sign her name to a paper without any knowledge that it was a deed, and she had no intention of conveying her property. The deed was never delivered nor acknowledged, but a genuine certificate of acknowledgment was in some way obtained and the deed recorded. No consideration passed, and the grantee had no knowledge of the deed, and was induced by artifice to sign papers which proved to be mortgages on the property. The owner lived on the property, with the grantee, her daughter, her name appearing in large letters on the doorplate and horse block, and the alleged *bona fide* mortgagees resided in the same city. It did not appear that the mortgagees ever saw the genuine signature of the owner, or made any investigation beyond the record. It was held that the owner was not estopped from questioning the validity of the fictitious mortgages, and was entitled to have them canceled. Two of the judges dissented from the conclusion of the majority. The opinion of the court, as will be observed, is very lengthy, and cites many authorities, principally New York cases. It is difficult, after a study of the case, to reach any other conclusion in the case than that declared by the majority of the court. It seems to be sound in principle, and unquestionably is the law. In connection with this case, the recent article of Mr. Chas. W. McKinney, on "Fraud Which Vitiates Signing and Delivery" (49 Cent. L. J. 384) will be found interesting and valuable.

NOTES OF IMPORTANT DECISIONS.

CANCELLATION OF MORTGAGE—FRAUD—RECORD OF FRAUDULENT DEED—ESTOPPEL.—The case of Marden v. Dorthy, 54 N. E. Rep. 726, decided by the Court of Appeals of New York, involves a question of considerable difficulty upon which the authorities are not harmonious. It appeared in that case that the owner of property was induced by artifice to sign her name to a paper without any knowledge that it was a deed, and she had no intention of conveying her property. The deed was never delivered nor acknowledged, but a genuine certificate of acknowledgment was in some way obtained, and the deed recorded. No consideration passed, and the grantee had no knowledge of the deed, and was induced by artifice to sign papers which proved to be mortgages on the property. The owner lived on the property, with the grantee, her daughter, her name appearing in large letters on the doorplate and horse block, and the alleged *bona fide* mortgagees resided in the same city. It did not appear that the mortgagees ever saw the genuine signature of the owner, or made any investigation beyond the record. It was held that the owner was not estopped from questioning the validity of the fictitious mortgages, and was entitled to have them canceled. Two of the judges dissented from the conclusion of the majority. From the very long opinion of the court we extract the following: "It is urged that, since the court found that the signature of the plaintiff to the instrument was genuine, she, therefore, signed a deed of her property, and, having done that, the defendants, having advanced money on the faith of the false record, are entitled to be protected by a court of equity. The fallacy of the whole argument is found in the assumption that the genuine signature of the plaintiff was made to a deed, whereas the finding is that she never executed, acknowledged, delivered, or was aware of the existence of such an instrument; that she never intended to execute a deed or any other instrument affecting her title to the property. These findings plainly mean that she never signed a deed, since if she did she must have executed it, and the fact that her signature is genuine is entirely consistent with the previous part of the finding. A party cannot make a deed without some assent of the will. It must be a conscious act, accompanied by an intention, and everyone of these elements are wanting in this case as appears from the finding. The genuine signature of a party may be procured by some trick or device to a piece of blank paper, and a deed or other instrument subsequently written over it without his knowledge. It may be that a party could procure another to sign a paper by means of hypnotic suggestions or influences, but a signature procured under such circumstances could have no more effect than if made by the hand of the hypnotizer. It does not follow in such a case that because the signature is genuine that the party signed a deed or other contract. It is simply a spurious paper, and of no more effect than any other forgery.

"But the argument wholly ignores the other part of the finding that the instrument was never acknowledged or delivered, and that the grantee named therein was not herself aware of its existence. The act of signing a deed is only one step in the process of changing the title to real property. The instrument is perfected only by delivery, and in this case that most important fact is negatived by the findings. No one can now claim that the grantee in the spurious paper ever received any title whatever under it, and, of course, she could not convey any better title through the mortgage than she had herself, unless some estoppel was established, and none was found. So that, even if the court had found that the plaintiff signed the deed of her house, instead of finding, as it did, that she did not, the other fact, that it was never delivered, would be a complete answer to the argument in support of the mortgages, since they must rest entirely upon the deed.

"The learned counsel has cited cases in this court, and in other jurisdictions, which he claims sustain his contention. Chapman v. Rose, 56 N. Y. 137; Simpson v. Del Hoyo, 94 N. Y. 189; Valentine v. Lunt, 115 N. Y. 496, 22 N. E. Rep. 209; Simson v. Bank, 43 Hun, 156, affirmed 120 N. Y. 623, 23 N. E. Rep. 1152; Page v. Krekey, 137 N. Y. 307, 33 N. E. Rep. 311; Lawrence v. Investment Co., 51 Kan. 222, 32 Pac. Rep. 816; Gavagan v. Bryant, 83 Ill. 376; Hunter v. Walters, L. R. 11 Eq. 292, 7 Ch. App. 75; Briggs v. Jones, L. R. 10 Eq. 92; Heyder v. Association, 42 N. J. Eq. 403, 8 Atl. Rep. 310. The distinction between these cases and the one at bar is so broad and so plain that it is difficult to see how it could be supposed that they had any application. In all of them it will be seen that the party sought to be charged consciously and voluntarily executed a contract, obligation, or conveyance of some kind or character, and for some purpose. There was an intention to execute, and an actual execution of, the instrument, in every case, followed by an actual delivery. There was the assent of the will to the use of the paper or the transfer, as the case may be, though that assent may have been induced by fraud, mistake, or misplaced confidence. In such cases, when the obligation is put in circulation, or when some instrument which clothes another with the *indicia* of title to property is used by him, the equities of innocent parties must be considered. But these principles have no application to this case, for the plain reason that, upon the findings, the plaintiff never intended to execute, and did not sign or deliver, any obligation, contract, or conveyance whatever. There is absolutely no act of the plaintiff upon which any right or equity can be based in favor of the mortgagees. It is doubtless true that a fraudulent grantee of real property may create a valid incumbrance upon it in favor of innocent parties, since, as to such parties, he has the title and has been clothed with

power to deal with the property. When the owner of land executes and delivers to another a deed of it, the title passes to the grantee named therein, although the former was induced by fraud to execute and deliver the instrument. The deed is not void, but voidable, and, until set aside, it has the effect of transferring the title to the fraudulent grantee, and the latter, being thus clothed, with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith. But in this case it would be preposterous to assert upon the facts found that the plaintiff's daughter, whose name appears as grantee in the spurious deed, ever had any title, or that she was ever clothed by anyone with the slightest power or authority to mortgage the property. In the face of the findings that the plaintiff never executed, acknowledged, or delivered the deed, no one is willing to assert that she ever had any title to convey. That the cases cited have not the slightest application to this case is, therefore, to my mind, a proposition too plain for argument.

"Nor is there any basis for the proposition that the plaintiff is estopped from assailing the mortgages, any more than there is for questioning the deed. There was no act or declaration on the part of the plaintiff to create an estoppel. It does not appear that the party who took the mortgages ever saw the genuine signature of the plaintiff, or acted upon it. What they acted upon was a false and fictitious record, which the plaintiff had no hand or part in making. That was made possible only by the genuine signature and false certificate of the acknowledging officer, who, though innocent of any wrong, had been imposed upon, as the officers of the bank were subsequently. It is manifest that the genuine signature of the plaintiff played no part in the creation of the false record upon the faith of which the defendants loaned their money, since even the notary did not act upon it. No one who had anything to do with the transaction seems to have known or seen the signature, and for all the purposes of the case, in view of the findings, it might as well have been simulated.

"The rule that, where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done, has no application to the case. In a recent case in this court it was shown that this rule, at best, is one applicable only in peculiar emergencies, and the limitations upon it were very clearly pointed out by Judge Finch. Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. Rep. 1052. If we were to ask what it was that the plaintiff did to enable the wrong in this case to be committed, it would be difficult for the learned counsel to answer it. The only answer to be found in his argument is that she signed the deed; but it has been shown, I think, that this proposition has no real foundation, in fact or in law. Moreover, although the plaintiff's signature to the paper is genuine, procured by some trick or artifice, it was never delivered or acknowledged by the plaintiff, and these two acts must be imputed to her before anyone can say that she, in any degree, contributed to the success of the fraud. There was no act or declaration on her part that enabled anyone to deceive third parties by means of a false record. That record was made by the production of a spurious paper to the notary, who was, in some way and by another trick or artifice, induced to attach his official signature to a false certificate.

"It is further found that during all the time covered by these several transactions the plaintiff was in possession of the real property in question. Her name appeared in large letters on the front door and on the horse block in front of it, and, while the possession of the plaintiff may have been somewhat obscured by the presence in the house with her of the son-in-law and his wife, this circumstance cannot change the legal effect of possession as notice of her rights to all the world. Phelan v. Brady, 119 N. Y. 587, 23 N. E. Rep. 1109; Holland v. Brown, 140 N. Y. 344, 35 N. E. Rep. 577; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. Rep. 349.

"I assume that no one will claim that the plaintiff changed or lost the possession of her house when she took in her daughter and son-in-law to live with her. In the case of Mygatt v. Coe, 147 N. Y. 456, 42 N. E. Rep. 17, we held that the possession of a married woman of her house was not affected by the circumstance that her husband lived with her and attended to the property, including the payment of taxes. Assuming that case to be still law, it is difficult to perceive how the plaintiff's possession was affected by the presence in the house with her of her daughter and her daughter's husband. The possession, in fact and in law, was still in the plaintiff, and that possession was notice to all the world of her rights. If the parties who made loans on the faith of a false record had but inquired of the plaintiff, all the facts would have been revealed. They all resided in the same city, and all that was necessary for the mortgagees to do in order to defeat the fraud, and save themselves from loss, was to visit the premises, and take note of what such a visit would disclose. In omitting such a plain precaution, the parties who proposed to loan money to Dorthy on the faith of a fictitious paper title have deprived themselves of the right to say that the plaintiff's genuine signature was the primary cause of their loss. If it be said that the plaintiff was not sufficiently vigilant in guarding against the fraudulent use of her signature by her son-in-law, as a means of depriving her of her property, though that fact is negatived by the findings, it must also be said that the mortgagees were quite as remiss in putting faith in a fictitious record when they could have discovered the fraud about to be practiced upon them by calling at the plaintiff's house. The defendants cannot be heard to claim that they were not bound to make any inquiries of the true owner, while insisting at the same time that she is bound by any trick or

artifice by means of which her signature was made to appear on a false paper.

"The case has thus far been discussed strictly upon the findings of the trial court, unanimously affirmed on appeal, but the defendants' contention would not be aided much if it is viewed in the broadest aspect, or enlarged by a departure from the findings. I have said that the defendants' claim rests upon a spurious or fabricated paper, but this expression does not describe the true character of the instrument. It was simply a forgery, in every legal or moral aspect in which it can be considered. That crime is defined by the common law to be the fraudulent making of a writing to the prejudice of another's rights (4 Bl. Comm. 247), or the making *malo animo* of any written instrument for the purpose of fraud and deceit (2 East, P. C. 852); the false making of an instrument which purports on its face to be good and valid for the purpose for which it was created, with the design to defraud (1 Leach, 366; Black, Law Dict. 508); the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability (2 Bish. Cr. Law, § 523); the fraudulent making of an instrument in writing to the prejudice of another's rights. People v. Cady, 6 Hill, 490; People v. Shall, 9 Cow. 778; People v. Harrison, 8 Barb. 560; Harris v. People, 9 Barb. 664. So, it is held that forgery may be committed by fraudulently procuring the signature of another to an instrument which he has no intention of signing. State v. Shurtliff, 18 Me. 368; Gregory v. State, 26 Ohio St. 510; Com. v. Foster, 114 Mass. 311. The true character of the instrument which is the sole basis of the defendants' contention is well illustrated by the case of State v. Shurtliff, *supra*. In that case a party agreed with another to sell to him one acre of his farm, and the intended grantee procured a draft of a deed describing the one acre intended to be conveyed, and presented it to the grantor, who examined it, and found it correct. The execution of this deed was, however, delayed, and the draft remained with the grantee, who afterwards fraudulently procured the draft of another deed, which covered and described the grantor's whole farm, and presented it to the latter for execution as the deed before examined, and it was executed and delivered. The grantee was convicted of forgery, and, upon a review of the case upon appeal, the court said: '"Forgery" has been defined to be a false making, or making *malo animo*, of any written instrument for the purpose of fraud and deceit. 2 Russ. 317, and authorities there cited. The evidence fully justifies the conclusion that the defendant falsely made and prepared the instrument set forth in the indictment, with the evil design of defrauding the party whose deed it purported to be. It is not necessary that the act should be done in whole or in part by the hand of the party charged. It is sufficient if he cause or procure it to be done. The instrument was false. It purported to be the solemn and voluntary act of the grantor, in making a conveyance, to which he had never assented. The whole was done by that hand, or by the procurement, of the defendant. It does not lessen the turpitude of the offense that the party whom he sought to defraud was made in part his voluntary agent in effecting his purpose. If he had employed any other hand, he would have been responsible for the act. In truth, the signature to that false instrument, in a moral and legal point of view, is as much imputable to him as if he had done it with his own hand. The art and management has no tendency to mitigate the charge, and the opinion of the court is that the crime of forgery has been committed. When the false making, with an evil design, is proved, artful subterfuges in defense have been disregarded, of which many of the cases cited for the government are illustrations.'

"It must be admitted that the case from which this quotation is taken was not nearly so rank in its general features as the case at bar. The grantor in that case intended to execute a deed, and it was executed and delivered, and, moreover, it was not infected, as the instrument in this case is, with the vice of a false certificate of acknowledgment. So that when the instrument under which the defendants now claim was placed among the public records it was nothing but a forgery. It was not only a forgery at common law, but a forgery by statute. The term 'forgery' includes now, as it always did, the false making of a written instrument (Pen. Code, § 520); and under section 521 it is forgery to utter or put off as true, with intent to defraud, a forged deed, knowing it to be forged. Placing the so-called deed in this case upon record, with intent to defraud, was an 'uttering or putting off as true,' within the meaning of the statute. Paige v. People, 3 Abb. Dec. 439. Moreover, a false certificate of an acknowledging officer to an instrument purporting to be a deed, that the same was acknowledged by a party thereto, is forgery, under section 510 of the Penal Code; and, while the absence of knowledge or a criminal intent on the part of the officer would absolve him from liability, yet that circumstance cannot, of course, change the character of the instrument of which the certificate is an essential part, or make it any the less a forgery.

"That the certificate attached to the paper in question was false is not, and cannot be, denied. It is found that the party to whom the defendants loaned money upon fictitious mortgages procured the officer to make the false certificate by some trick or artifice, and, by section 29 of the Penal Code, one who directly or indirectly induces or procures another to commit a crime is a principal. People v. Fitzgerald, 156 N. Y. 253, 50 N. E. Rep. 846; People v. McKane, 143 N. Y. 455, 38 N. E. Rep. 950.

"The fact that a false and fabricated writing of this character is deposited in a public office for record, and is actually recorded, can add nothing

to its legal efficacy. The recording act applies to genuine instruments, and not to forged ones. Bank v. McCarty, 149 N. Y. 71, 43 N. E. Rep. 427. It may be that the actual record of such a paper may deceive the unwary, but that circumstance does not change the legal rights of anyone. A bank may loan money upon the security of a pledge or mortgage of personal property in the possession of the thief who has stolen it, and the loan may be made in good faith, on the honest belief that the thief who has the possession has the title; but this would not prevent the real owner from pursuing his property, and taking it wherever he could find it. Knox v. American Co., 148 N. Y. 441, 42 N. E. Rep. 988. It would not help the bank in that case to allege, as the defendants in this case allege, that it was a *bona fide* purchaser. It is legally impossible for anyone to become a *bona fide* purchaser of real estate, or a purchaser at all, from one who never had any title, and that is this case. It is equally impossible to construct an estoppel against the real owner upon a forged instrument, placed upon record without the authority of anyone, and, of course, the paper in question was no more entitled to record upon the false certificate than if it contained no certificate whatever. Void things are as no things.

"This fabricated writing and false record, it is said, has invested the defendants, holding fictitious mortgages, with the character of *bona fide* purchasers of real estate, and so has the effect in law of devesting the plaintiff of the title to her house and transferring it to the defendants; or, if this proposition should seem to be too drastic, then we are asked to hold that the plaintiff is estopped from raising any question with respect to the validity of the paper, since she was the involuntary victim of crime. It is said that, since some one must suffer, it is better that the plaintiff should lose her house than that the bank should lose its money. I have stated, at, perhaps, undue length, some of the reasons that constrain me to reject the argument. It has always been supposed that real property could not be the subject of larceny, but this is evidently a mistake, if it be true, as the defendants' counsel claims, that the false papers, which the judgment in this case has declared void and set aside, are to be given such legal effect as to devest the plaintiff of her property and convey it to the defendants. In that case the process of stealing real estate, if I may be permitted to use that expression, will be very simple and comparatively safe. All that will be necessary for the criminal to do, in order to feloniously appropriate to his own use the real property of another, is to fabricate a deed that shall contain the signature of the true owner, genuine if possible, by any trick or artifice, but, if not, then simulated, since that will be just as good. The next step will be to procure a notary to attach to it a false certificate that the owner acknowledged it before him, and then file it in the clerk's office. It will not be necessary that the true owner should ever see the paper or deliver it to anyone. If the grantee named in this false paper should be able to find a bank or an individual willing to loan money on the faith of such a record, as Dorthy did in this case, the theft will be complete, since the title of the true owner will be extinguished by the *bona fide* intentions of the deluded money lender, or the owner will be estopped by reason of the confidence which it is said may have been reposed in the record of a crime.

"The proposition that a person or a bank, engaged in loaning money, may, if ignorant of the real facts, rely upon a falsehood placed upon record by criminal means, to the prejudice of the rights of the true owner of real estate, must open the door for the destruction of all titles, and make it much easier for the criminal to purloin real than personal property. It is said that the false deed in this case was duly recorded, but surely this must be an inadvertence, since it is impossible to conceive that a writing, purporting to be a deed, but never executed, acknowledged, or delivered, could be 'duly recorded.' The act of the registrar in copying on his books a forged instrument, deposited with him as part of a criminal scheme, cannot very well be called 'duly recording' a conveyance of land. So, it is said that the presence of the plaintiff's genuine signature on the paper rendered the fraud possible, but this assertion is manifestly without foundation. Even if it could be held that a woman who happens to own a house is bound by her signature to such a paper, by whatever trick or artifice procured, still, since she never delivered the paper, or in any way authorized it to be put in circulation, and as she never acknowledged it so as to entitle it to be recorded, it is very difficult to see what connection her signature has with the acts of the defendants in taking the mortgages from Dorthy. The record found in the clerk's office, upon which the defendants say they relied, was simply the result of a crime, and, if they were deceived by it, there is no principle of law or equity that will permit them to make their loss good from the plaintiff's property. They are the victims of a criminal contrivance in which they put faith, and they must seek redress from the criminal who conceived and executed the fraud."

ACCIDENTS — VIOLENT, EXTERNAL, VISIBLE.

The institution and development of accident insurance has necessitated judicial construction of the word "accident," as applied to insurance contracts. The definition of the lexicographer that "an accident is an unintended or unexpected untoward occurrence, or that which happens blindly and without intelligent design," no longer suffices for

every injury not intended by design. It is now necessary to analyze the various elements of the unexpected happening, and, so far as insurance at least is concerned, many of the ordinary mishaps need the judgment of a court before the accidental character of the occurrence can be established with authority. It is not difficult to comprehend an accident as the happening of an event without the concurrence of the will of the person by whose agency it is caused,[1] but it is something more to establish that the unintended happening is of such a character as is provided against by contracts indemnifying the assured for damages against accidents. The insurer, of course, can never be held liable for a form of injury not provided for by the contract, but the difficulty lies in determining what is an accident within the scope of the agreement.

An accident must be an event which takes place without one's foresight or expectation. It may proceed from some unknown cause, and be, therefore, unexpected. It is a chance, a casualty. The word accidental literally signifies happening by chance or unexpectedly; taking place not according to the usual order of things,[2] and some degree of violence or *vis major* must necessarily be involved in the term accident.

By the terms of contract, the assured is usually guaranteed a stipulated compensation for injuries that are "violent, accidental, external and visible," and such provisions have thus far been very liberally construed in favor of the party insured.[3] There is good authority, however, to the effect that the absence of the terms external and violent from the contract have been held immaterial, as both terms virtually are embodied in the word accidental. The master of a ship was insured against any injury from or by reason or in contemplation of any accident which should happen to him, or upon any ocean, sea, river or lake. In the regular course of his vocation as master, the insured suffered a sunstroke, and shortly after died from its effects. The company in which the deceased was insured refused payment on the ground that death was not caused by an accident. In passing upon this contention the court said: "We cannot think that disease produced by the action of known causes can be considered as accidental. This disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate or atmospheric influences, cannot, we think, properly be said to be accidental.[4] In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain brought on by exposure to the too intense heat of the sun's rays."[5] If, therefore, a result follows from such means as are voluntarily employed in the customary way, the result following cannot be considered as the effect of accidental means. There are similar instances where the same conclusion has been reached. Where the insured, having risen from bed, and attempting to draw on his stockings, died suddenly from a sudden pressure over and upon the heart, by which the colon was caused to fall out of its place and to become folded, the ensuing death could not be held to have been the result of an accident, within the meaning of a contract insuring against bodily injury caused by violent, accidental, external and visible means. A person may do certain acts, the result of which may produce unforseen consequences, and may produce what is commonly called "accidental death," but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if this is so, where does the question of accident come in? The man is doing just what he intended to do, and an unfortunate and unexpected result happen—the man's death. This is not so, however, where, preceding the injury, something unexpected, unforseen and unusual occurs, which produces the injury. For then the injury must have resulted from accidental means."[6] Thus, where a fall produces Bright's disease,[7] where fever follows a wound, where the tympanum of the ear is

[1] Black, Law Dict., p. 61.

[2] North Am. L. & Acc. Ins. Co. v. Burroughs, 69 Pa. St. 43; Mallory v. Travelers' Ins. Co., 47 N. Y. 52.

[3] Sinclair v. Maritime Pass. Assur. Co., 3 El. & El. 478; Lovelace v. Travelers' Prot. Assn. Co., 28 S. W. Rep. 877.

[4] Sinclair v. Maritime Pass. Assur. Co., 3 El. & El. 478.

[5] Clideo v. Scottish Acc. Ins. Co., 29 Scot. L. Rep., p. 303.

[6] U. S. Mutual Acc. Assn. v. Barry, 131 U. S. 100.

[7] Cross v. Ins. Co., Bliss, Life Ins., p. 71.

ruptured by diving,[8] where blood poison or erysipelas develop from a cut or fall,[9] where tetanus is caused by a cut, the injuries sustained have been held to have been occasioned by accidental means.[10] Likewise, where the peritoneum was perforated by a pitchfork, and inflammation ensued, causing death, the company was held liable under its contract against accidental injuries.[11] Even where death has resulted from pneumonia, which was contracted on account of the weakened condition of the body of the insured, caused by an accidental injury, the accident, although quite remote from its effect, is held sufficient to sustain the insurer's responsibility.[12] In Martin v. The Equitable Accident Association, before cited, the insured accidentally cut or wounded a finger on his right hand, and some substance, either from the instrument that made the cut or wound, or from some other source or manner, was accidentally communicated to the cut or wound, and poisoning ensued, occasioning the death of the insured. It also appeared that the insured had accidentally received an injury upon the thumb of the left hand by a bruise; that the wound suppurated and was lanced, and that virus from this sore upon the thumb may have been communicated to the second injury at the time of its occurrence, and might have produced the blood poisoning. In the opinion of the court it was held "that the evidence showed that the death was produced by blood poisoning, and that this was occasioned by the inoculation into the wound of some poisonous substance at or very soon after the wound was made. If the inoculation occurred at the time the wound was made, so that it was, in fact, a part of the accident, I see no good reason why the death might not be attributed to the accident as the sole and proximate cause, although blood poisoning ensued."

There is nothing in the definition of the word accident which excludes negligence of the insured party as one of the elements contributing to produce the result. An accident may be an unusual result of a known cause, and therefore unexpected to the parties.[13] Even where another intentionally injures a person, the injury not being the result of misconduct or the participation of the injured party, but being unforseen, it is as to him accidental.[14] It has accordingly been held to be an accident when the assured was lynched by a mob.[15] But where it is expressly provided in the contract of insurance that the insured is to use due care and diligence for personal safety, the negligence or want of care of the insured will defeat a recovery. The external and violent character of the means causing the injury must be well established in order to bring the accident within the provisions of such policies as require evidence of the violent and external character of the injury. In other words, without the external and violent character, the injury is not an accident according to the contract. There have been many and contradictory opinions, in determining the external and violent character of accidents. Where the insured, while eating beefsteak, choked to death, by reason of the beefsteak passing into his windpipe, death was said to have been caused by external, violent and accidental means. In construing the clause restricting the character of accidents, Judge Pryor says: "It was not designed that there should be such external violence as a fall, a kick, or a blow on the person as would cause death or an injury, before the liability of the company should arise. This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accident, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes, and that were liable to occur at any time from natural causes."[16]

Thus even where the insured had been found dead in a bed room of a hotel, death having resulted from asphyxiation, it was held, "that a death is the result of accident or is unnatural, imparts an external and vio-

[8] Rodey v. Trav. Ins. Co., 3 N. Mex. 316.
[9] Martin v. Equitable Acc. Assn., 61 Hun, 467.
[10] Travelers' Ins. Co. v. Melick, 65 Fed. Rep. 178.
[11] North Am. L. & Acc. Ins. Co. v. Burroughs, 69 Pa. St. 43.
[12] Isitt v. Railway Pass. Assn. Co., 17 C. B. (N. S.) 122.
[13] Freeman v. Traveler's Ins. Co., 144 Mass. 572.
[14] Phelan v. Trav. Ins. Co., 38 Mo. App. 640; Richards v. Trav. Ins. Co., 89 Cal. 170.
[15] Fidelity Ins. Co. v. Johnson, 17 South. Rep. 2
[16] Am. Acc. Co. v. Reigart, 94 Ky. 547.

lent agency as cause."[17] But, on the contrary, it had before been held by the Supreme Court of New York, that death was not effected through external and violent means, in a case where a physician drank by mistake water from a goblet in which there was poison.[18] In order to comply with the provisions of a contract requiring an injury to have been occasioned by means, external, violent and visible, in a leading case, it is observed: "In stooping to pick up a marble the plaintiff used some extra exertion and some extra physical force, and I think that the expression 'violent' is satisfied by the facts which attended the injury. The cause of the injury was accidental in the sense that the injury was a casualty and unforseen and unexpected, and in construing that word it is important to bear in mind the other part of the policy which deals with matters internal. It is suggested that the resistance of the floor supplies the external cause. I think a more obvious cause is the act of reaching after the marble and the wrench which accompanied the act. That stooping and reaching after the marble was certainly not an internal cause, but was, in my opinion, an external cause within the policy. Once admit that there is an external cause it is plain that it was a visible one, and the condition of the policy is satisfied."[19] In similar cases where the terms of the policy have limited the contract to bodily injuries, the external sign of which must be visible, it has been held that although there are reasons for such conditions applying to a surviving claimant because of the unusual chances for feigning an internal injury, if fraud is contemplated, still no such protection is necessary where the accident causes death. The dead body itself is the best evidence of an external and visible sign that an injury has been received.[20] And although the sign of the injury must be visible and external, it does not necessarily follow that the injury must be external. Visible signs are evidenced not only by broken limbs and bruises on the surface of the body. Other external indications may also conclusively furnish visible signs of the injury. Thus neither complaint of pain, nor complaint of internal soreness would furnish a visible sign because not perceptible, but if a pale and sickly look is produced by an internal injury, or if vomiting or retching or bloody and unnatural discharges are occasioned thereby, or if there appears to the eye, in the struggle of nature, any sign of the injury, there are then present external and visible signs provided they are the direct result of the injury.[21] Death by suicide has been classed among those accidents caused by injuries effected through external means.[22] By a policy of insurance against accidents, one naturally understands that he is to be indemnified against such accidents as result wholly or in part through his own inadvertence.[23] But it is nevertheless to be remembered that it is the natural and expected tendency and policy of the insurer rather not to extend but to limit its liability, and for this reason it has now become the part of prudence to ascertain, in advance, the exact limitations of the contract. The conditions of a policy are usually construed against the insurer, but despite this tendency of the protection of the court, contracts for accident insurance are more than likely to be so hedged about by ambiguous expressions and uncertain phrases that there is produced such a net work of doubtful meanings, that courts cannot always be expected to furnish the insured all the relief to which he may have imagined himself entitled.

Albany, N. Y. GEORGE LAWYER.

[17] Paul v. Trav. Ins. Co., 112 N. Y. 472.
[18] Hill v. Hartford Ins. Co., 22 Hun, 187.
[19] Hamlyn v. Crown Acc. Ins. Co., 1 Q. B. 750.
[20] McGlinchey v. Fidelity Ins. Co., 80 Me. 251; Landon v. Preferred Acc. Ins. Co., 43 App. Div. (N. Y.) 487; Larkin v. Interstate Casualty Co., 43 App. Div. (N. Y.) 365; Whitlach v. Fidelity & Casualty Co., 149 N. Y. 45.
[21] Barry v. U. S. Mutual Acc. Asso., 131 U. S. 100.
[22] Crandall v. Acc. Ins. Co., 27 Fed. Rep. 120.
[23] Champlin v. Railway Pass. Assur. Co., 6 Lans. 71; Keene v. N. E. Mutual Acc. Asso., 161 Mass. 149.

WILLS—MENTAL CAPACITY—INSANE DELUSION—EVIDENCE.

DOBIE v. ARMSTRONG.

Court of Appeals of New York, November 21, 1899.

Testator's son, who had been educated at his father's expense, became intemperate and improvident, and took his mother's part in divorce proceedings, consulted with an attorney who was his father's bitter foe, and wrote a letter to an uncle in which he abused his father, and spoke of him as being fit for the penitentiary. After the divorce he lived with his mother, and never again saw or communicated with his father, who died 14 years later. The father had,

without reason, while in anger, called the son a bastard, but doubtless as a countercharge to his wife, who had accused him of adultery. Five years before his death testator conveyed property to a college, and later made a holographic will, leaving the bulk of his estate to the college. To this a codicil was added, slightly changing the conditions, and before his death he made another will to the same effect. He was a man of extraordinary intellectual vigor, managed his estate until his death with ability, and his letters to the college trustees showed a purpose, formed several years before his death, so to dispose of his property. Held not to show a mental delusion, with respect to the son's character and habits, sufficient to justify submission of the testator's capacity to make a will to the jury.

GRAY, J.: The plaintiffs, who are executors of, and also legatees and devisees under, the will of Thomas Armstrong, deceased, brought this action to establish the validity of the testamentary probate. The testator died in December, 1895, and his will was probated in the surrogate's court of Clinton county in May, 1896. In the present action Emmett Armstrong, the only child and son of the deceased, and Harriet Armstrong, a divorced wife, were made defendants. The latter disclaimed all interest in the testator's personal estate, and upon the trial, the judgment divorcing her from the deceased was conceded to be valid. The son, to whom the will gave nothing, contested its validity, upon the ground that his father was of unsound mind and incompetent to make a will. At the conclusion of the trial, the court directed the jury to find a verdict in favor of the plaintiffs, and a judgment was entered thereupon establishing the validity of the will. The appellate division has affirmed the judgment, and an appeal has been taken to this court.

It is insisted upon by the appellant that the evidence was sufficient to raise a question of fact as to the testamentary capacity of the testator, which should have been submitted to the jury. His contention is that the evidence proved, or strongly tended to prove, that the testator was influenced in making his will by a mental delusion with respect to his son's character, conduct, and habits. I think it unnecessary to indulge in any extended discussion of the facts of this case, inasmuch as they were quite fully reviewed, first, by the learned trial judge upon his direction of the verdict, and, again, at the appellate division.

Thomas Armstrong was 76 years of age at the time of his death. He came to this country a poor and friendless boy, and commenced to work at his trade of a tailor. In 1842 he married his first wife, the defendant Harriet, and soon commenced the study of the law. In 1847, he took up his residence in Clinton county, in this State, became a member of the bar, and attained a position of eminence thereat, and, generally, in the community. At one time he was district attorney for his county, and during the war of the Rebellion he had served as the colonel of a volunteer regiment. In the course of his life he accumulated an estate of some $250,000, and, alone, managed his business affairs until his death. Emmett Armstrong, the testator's son, was born in 1848, and was educated in part at Union College, in this State, and in part in Europe. He was permitted to travel considerably in Europe by his father, who seems to have had much affection for him, and to have exhibited some pride in his attainments. Early in life he appears to have contracted habits of intemperance, and was inclined to be improvident and lax in money matters. In 1882 the testator and his wife ceased to live together, and considerable litigation ensued between them. She was seeking to obtain an absolute divorce here, and he obtained such a judgment in the Dakota courts, in 1883, by default. As the final outcome of negotiations, an agreement was entered into between them to the effect that the default obtained by him should be opened; that she should appear in the action; and that, in case of judgment of divorce should be finally rendered in his favor, it should provide for the payment to her of the sum of $15,000 as alimony and in lieu of dower. Such a judgment was entered, and thereafter Mrs. Armstrong removed to Pennsylvania, where she invested the moneys received by her, and supported herself and their son, Emmett, who had accompanied her.

In 1889 the testator married another woman, with whom, it may be inferred from the evidence, he had previously become infatuated. In 1890 he conveyed by deed certain real estate to Union College; the income of which, amounting to about $6,650, was to be applied toward maintaining professorships and the support of students who should be farmers' sons from Clinton county. In 1891 a second deed of the same property to the college was executed, jointly, by the testator and his wife, which recited the obligation of the college to pay the sum of $1,000, a year to her during her life. In 1893 the testator made a holographic will, which, after some small bequests, gave the residue of his estate to Union College for the purpose of establishing certain annual prizes and certain scholarships for the sons of farmers of Clinton county. Judge Landon, a justice of the supreme court of the State and a trustee of the college, and Dr. Webster, then president of the college, were made residuary legatees as to all property not legally disposed of. Afterwards, the testator executed a codicil, whereby he gave to his wife an annual income of $1,000, which, with the provision in the college deed, would assure her an annual income of $2,000. In May, 1895, he executed a second holographic will, which gave the remainder of his estate to the college for the same objects as previously expressed, and provided, as in the former will, that, as to any part of his estate not legally devised, it should go to Judge Landon and to Dr. Raymond, then the president of the college, in succession to Dr. Webster. These were the three testamentary papers which were admitted to probate.

With respect to the disposition of his estate in favor of Union College, it may be observed that

the interviews and correspondence had between Armstrong and Judge Landon show the formation and development of such a purpose for several years prior to the former's death. In the evidence furnished by the testimony of persons who had known the deceased and had had intercourse, in business and other ways, with him, and by the latter's letters and documents, we have indisputable proof that, in the conduct of his life, the testator had been a man of extraordinary intellectual vigor and ability. His characteristics were those of a self-willed, proud, and passionate man; who certainly made little, if any, effort to govern his impulses, or to exert any control over a very bad temper; who frequently engaged in bitterness of speech, or in making defamatory statements; and who was cruel, and, at times, even brutal, in his conduct. He was most eccentric in his habits, and in entertaining singular, and often extravagant, theories. He was highly sensitive and susceptible to offense, and his pride, or vanity, was such as, probably, to prevent him from making advances. For several years prior to his death his health was affected by a disease of the kidneys; but though, at times, greatly prostrated by its attacks, he seemed to have had remarkable powers of recuperation. His emotions were easily excited, and he would be effusive in his demonstrations of affection or of grief. The appellant has brought together a multitude of instances exhibiting these various and peculiar characteristic traits of the deceased, and he claims to have shown that his mind was unbalanced, and incapable of that soundness of judgment which the testamentary disposition of his property required.

Ordinarily, the burden of proof is upon the party propounding a will; but section 2653a of the Code of Civil Procedure, which is the authority for the maintenance of this action, places the burden upon the defendants, who contest the validity of the will, of establishing the testamentary incapacity of the testator. The probate of the will by the surrogate is made *prima facie* evidence of its due execution and validity. The affirmative was with this appellant upon the question of the case, whether a delusion, or an insane belief, existed in the testator's mind with respect to his domestic relations, and, especially, with respect to his son, which incapacitated him from validly willing away his estate. The burden was upon him to adduce evidence which would be sufficient to uphold a verdict that the testator was the victim of such a delusion, with respect to his son, as to prevent his affections from operating in their natural channel. He assumed the burden of showing that there was no cause for his father's changed feelings, in facts or in actual circumstances, and therefore that they could only have had their origin in some figment of the brain.

Up to 1881, the testator and his wife lived together, as husband and wife, although their relations had become strained. The son was then 33 years of age. He had disappointed his father by his refusal to engage in business. From his wife's letters, from reports, and from observation, the testator believed that his son was intemperate and gambled. These ideas were not enough, however, to turn him against his son, and would not, necessarily, have done so, had not the events from 1881 to 1886 supervened. During those years, when litigation existed between him and his wife, his feelings of dislike for the latter were accentuated by mortification at the charges made by her against him, and his affection for his son was destroyed from various causes. His son had espoused his mother's side, and among the many things, in addition to that, which might be alluded to as contributing towards the destruction of his affection, were, possibly more prominently, these: That he consulted upon his mother's matters with Mr. Smith M. Weed, a lawyer, who was conspicuous in public life, a political antagonist of his father, and for whom the deceased entertained hostile feelings; that he wrote a letter to an uncle, in which, after much abuse of his father, he spoke of him as being fit to be sent to the penitentiary; and that from 1881 to the time of his father's death, in 1895, a period of 14 years, there were absolute silence and an estrangement on his part.

Stress is laid upon the fact that the testator was known to have called his son a bastard, without any reason; but that, evidently, was not his belief. He, undoubtedly, said so in anger and excitement, and when he wrote to his wife, in 1882. That letter, however, was after his wife had charged him with adultery, and, quite possibly, was a counter attack on his part, to deter her from prosecuting the charges. If it was true that he believed his son to be a bastard, he could not have written to him with such affection and consideration as he certainly had often done.

It is plain that the will, in its provisions, was not the result of any sudden impulse, but, rather, of a definite purpose, formed in prior years and while the estrangement existed between him and his son. The experts who testified in the case for the contestant seemed practically forced to concede that, without the assumption of the existence in the testator's mind of a delusion as to his son, he could not be regarded as mentally unsound at the time of making his will. The hypothetical question, which was answered by the experts for the contestant in favor of his contention that the testator was mentally unsound, resumed a quantity of isolated facts and expressions during a great number of years. When brought together in this question, they are made to present that appearance of continuity, with respect to the testator's state of mind, which makes the question unfair, as describing the self-made and successful man with whom we are made acquainted through the evidence. The assumption in the hypothetical question of the existence of an insane impulse with regard to his son, from his having characterized him as a drunkard and as an otherwise worthless character, was not warranted by the

evidence. There was not an absence of facts, or of circumstances, for the formation of such impressions by the deceased.

Apparently, at times, entertaining irrational opinions and views of men and of affairs, eccentric and arbitrary in conduct, the evidence, as a whole, shows that the testator was quite capable of personally managing his various interests, and that he could not be regarded as insane, however different he might be from other men.

It seems to me that this was not a case which should have been submitted to the decision of the jury. The contestant had not met the burden cast upon him by the statute of impeaching the validity of the testamentary act. The evidence does not prove, or even tend to prove, that the testator was insane when he executed the testamentary instruments in question. It fails to prove that he was not influenced by any insane delusion in his domestic relations. The proof is abundant that they were sufficiently unfortunate and unhappy, whether attributable to his behavior or not, to embitter him, and, with his peculiar temperament, to harden his affections against the son, who had disappointed his ambitions, and who, turning against him in his later years, had passed out of the sphere of his life.

When we consider what was the intellectual strength of his mind, and his self-sufficiency, as shown through his long life, and the reasons, good or bad, which undoubtedly existed for his making the disposition of his property complained of, it is impossible to say that there was any substantial foundation in the proofs for a judgment that the testator's mind was so diseased as to incapacitate him from making this will. A man's testamentary disposition of his property is not invalidated because its provisions are unequal or unjust, or the result of passion, or of other unworthy or unjustifiable sentiments. It is natural, and therefore usual, to make provision for a child; but, under our governmental institutions, no obligation to do so is imposed upon the parent, and the presumption of validity is not affected by the failure to do so, alone. Nor is the presumption in favor of a will overcome by showing that the testator was of advanced age, or of enfeebled condition of mind or body. Horn v. Pullman, 72 N. Y. 269. That the testator may have received some unjustifiable impression, which had actuated him in making his will, does not warrant us in calling it a delusion. A man may even have an insane delusion, and yet be able to make a valid will; for the will, to be invalid, must be the result itself of the delusion, and it is not a delusion which incapacitates, if the proof of its existence depends upon external and observable facts, giving rise to impressions which, upon investigation, might be proved to be unjust. *In re* White, 121 N. Y. 406, 24 N. E. Rep. 935, where it was the proposition of the contestants that, when the will was made, the testator was laboring under the insane delusion that his son was engaged in a conspiracy to injure and to defraud him, and that the will was the offspring of such a delusion and therefore invalid, it was observed that "delusion is insanity, where one persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence. * * * But if there are facts, however insufficient they may in reality be, from which a prejudiced or a narrow or a bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect. The belief may be illogical or preposterous, but it is not, therefore, evidence of insanity in the person."

I cannot bring my mind to the conclusion that the evidence was sufficient, in this case, to warrant its submission to the jury. Whether it was sufficient was a question of law for the court, and the trial judge, in holding as he did, in my opinion, committed no error. The trial court was not required to submit the question of the testator's mental capacity to the jury, merely because some evidence had been introduced by the party bearing the burden of proof. Dwight v. Insurance Co., 103 N. Y. 341, 8 N. E. Rep. 654; Linkauf v. Lombard, 137 N. Y. 417, 425, 33 N. E. Rep. 472. The legislature never could have intended, and the statute does not compel the construction, that courts should hold that every case which is brought under section 2653a of the Code must be submitted to the arbitrament of a jury. Experience has shown that verdicts are frequently unduly influenced by considerations based upon sentiment and sympathy, and no wise policy demands that, in cases of such importance and of such far-reaching consequences, the jury should determine the controversy upon any showing of the contestants. Their verdict should proceed upon such evidence as would warrant the court, in its review of the facts, in holding that it actually tended to prove such mental unsoundness in the testator, when proceeding to make a testamentary disposition of his property, as, by reason of the existence of some delusion, to render him incapable of forming a judgment as to the condition of his property, or of apprehending his true relations to the person whom his will deprives of the share in the estate which was reasonably, or naturally, to have been anticipated. Such cases are fraught with the gravest consequences, and I do not believe that a solemn testamentary disposition of property should be left to the decision of a jury upon mere surmise, or upon inferences from facts which are as consistent with the one view as with the other. I think that the evidence produced by the contestant was not of a nature that the jury could have properly proceeded to find a verdict upon it in his behalf, and, further, that, if such a verdict had been rendered, it could not have stood the test of a motion addressed to the court to set it aside. I advise the affirmance of this judgment. All concur, except Parker, C. J., not sitting. Judgment affirmed.

NOTE.—*Recent Decisions on Effect of Insane Delusions on Capacity to Make a Will.*—A belief by testator, founded on rumors which he had heard, that the son of his wife was not his son, in consequence of which he disinherited such son, is not a delusion, though he may have been mistaken in such belief. *In re* Smith's Will, 24 N. Y. S. 928. Declarations of testator that he had more property than anyone knew of, that he had enough to make all his relations rich, and that, if he could have a certain girl for his wife, he would give her "a necklace of $20 gold pieces that will go round her neck and reach to the ground," do not show an insane delusion as to the amount of his property. *In re* Jones' Will, 25 N. Y. S. 109, 5 Misc. Rep. 199. The mere fact that testator, a man perfectly competent to manage his affairs, and possessing good mind and memory until his death, labored under the delusion that his family was trying to kill him, is insufficient ground to avoid the will. Edwards v. Davis (Ohio Com. Pl.), 30 Wkly. Law Bull. 283. Where testator, because of an erroneous belief as to one of his heirs, disinherited him, the will is nevertheless valid, unless such erroneous belief was an insane delusion. *In re* O'Dea's Will, 33 N. Y. S. 463, 84 Hun, 591. In determining the capacity of a testator who was alleged to be guided by insane delusions, the question to be determined by the jury was not the soundness of the views entertained by him, but whether they so impressed his mind as to control his judgment in the disposition of his property, so as to prevent his appreciating the duty he owed to his family. *In re* Trich's Will, 165 Pa. St. 586, 30 Atl. Rep. 1053. In the contest of a will, where the testator is not alleged to have been generally insane, but to have been governed by peculiar religious views, the question to be determined is: "Was the testator the victim of delusions which render him insensible to his parental obligations, so as to cause him to give his estate to certain institutions, instead of to his own children?" *In re* Trich's Will, 165 Pa. St. 586, 30 Atl. Rep. 1053. A belief in spiritualism is not conclusive evidence of a want of testamentary capacity if testator is not affected by any delusion on matters of fact connected with the making of the will or the objects of his bounty. McClary v. Stull (Neb.), 62 N. W. Rep. 501. A mistaken belief of testator in respect to a person's character is not insanity, and will not avoid the will. *In re* Lang's Will, 30 N. Y. S. 338, 9 Misc. Rep. 521. The fact that testatrix was old and childish, and, after disposing of her realty to the exclusion of an only child, gave the child a cash legacy, but did not leave sufficient cash and personalty to pay the same, did not show that she labored under a delusion that she had money in bank, and so show her mentally incompetent. Hall v. Perry, 87 Me. 569, 33 Atl. Rep. 160. Though one be of sound mind in regard to his dealings in general, yet, if he be under an insane delusion, and his will be the direct off spring thereof, and different from what it would have been but for such delusion, it cannot stand. Thomas v. Carter, 170 Pa. St. 272, 33 Atl. Rep. 81. A mere prejudice, however unreasonable, or a mistake of fact, however absurd, is insufficient to avoid a will on the ground that testator was laboring under an insane delusion. *In re* Oberdorf's Estate (Orph. Ct.), 2 Lack. Leg. N. 43. That testator left nothing to heirs, because of a mistaken belief that they were hostile to him, is not ground for avoiding the will, but there must have been an insane delusion. *In re* Ruffino's Estate, 116 Cal. 304, 48 Pac. Rep. 127. An opinion which is merely simulated and but a fleeting vagary is not an insane delusion. *In re* Redfield's Estate, 116 Cal. 637, 48 Pac. Rep. 794. A will is not invalidated by delusions of testatrix which do not relate to the persons or objects affected by it. *In re* Redfield's Estate (Cal.), 116 Cal. 687, 48 Pac. Rep. 794. It is proper to refuse an instruction that a will was invalid if testator had become estranged from contestant, and hostile to her, by reason of "false beliefs" in regard to her, and this feeling of hostility influenced him in excluding her from his will; the issue being insanity, and a false belief not being necessarily an insane delusion. Appeal of Kimberly, 68 Conn. 428, 36 Atl. Rep. 847. An "insane delusion" is defined with sufficient accuracy in a charge that it is "a false belief, for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction, through evidence or argument," and it is only where "false beliefs are such as a reasonable man would not, under the circumstances, entertain, that they become insane delusions." Appeal of Kimberly, 68 Conn. 428, 36 Atl. Rep. 847. Rev. St. 1894, sec. 2726 (Rev. St. 1881, sec. 2556), provides that persons of unsound mind may not execute a will; section 2714 (section 2544) defines a person of unsound mind as an "idiot, *non compos*, lunatic, monomaniac, or distracted person." Held, that a monomaniac was not necessarily incapacitated from executing a will. Young v. Miller (Ind. Sup.), 145 Ind. 652, 44 N. E. Rep. 757. A request to instruct that if testator was under a hallucination or delusion, or erroneous opinion amounting to delusion, as to facts in the conduct of any of the beneficiaries under the will, it was evidence that he was not of disposing mind, was properly modified by limiting it to insane delusions. Maynard v. Tyler (Mass.), 46 N. E. Rep. 413. An insane delusion, inducing the execution of a will, made a month after testator had been adjudged a lunatic, and taking from the family of a deceased son $4,000 of the $5,700 testator had given them by a previous will, is shown by evidence that about 18 months after the previous will was made, and 3 years before testator was found insane, he conceived the idea, without any cause, that he had been poisoned by his daughter-in-law and children, with whom he had been living, and that he could not be dissuaded. *In re* Lapham's Will (Surr.), 44 N. Y. S. 90, 19 Misc. Rep. 71. A will made under the promptings of a delusion, or in the belief in facts the existence of which no rational person would believe, is void, though testatrix was sane in other respects. Orchardson v. Cofield, 171 Ill. 14, 49 N. E. Rep. 197, 40 L. R. A. 256. The mere existence of a delusion on the part of a testator will not vitiate his will, where the provisions thereof were not dictated thereby. Peninsular Trust Co. v. Barker (Mich.), 74 N. W. Rep. 508. In order to avoid a will on account of testatrix's belief in spiritualism, it must be shown that such will was the offspring of such belief. *In re* Rohe's Will, 50 N. Y. S. 392, 22 Misc. Rep. 415. That testatrix was under a delusion as regards a relative whom she excluded from participation in her estate is not shown by evidence that, shortly before making the will, her feelings toward such relative underwent a marked change, so that she came to fear and dislike her. *In re* McGovern's Estate, 185 Pa. St. 203, 39 Atl. Rep. 816.

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Curiosities of Law and Lawyers. By Croake James. New Edition Greatly Enlarged. New York: Funk & Wagnalls Company, 1899. Cloth, pp. 790, Price $3.00. Review will follow.

Civil Procedure at Common Law. By Alexander Martin, LL.D., Dean of the Department of Law in the University of the State of Missouri. Boston: The Boston Book Company, 1899. Sheep, pp. 416, Price $3.50. Review will follow.

A Treatise on the Law of Evidence, by Simon Greenleaf, LL.D. In Three Volumes. Sixteenth Edition, Revised, Enlarged, and Annotated, by Edward Avery Harriman, Professor of Law in the Northwestern University Law School. Boston, Little, Brown and Company, 1899. Review will follow.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. LXIX. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1899. Review will follow.

The Law of Jurisdiction, Including Impeachment of Judgments, Liability for Judicial Acts, and Special Remedies as Follows: Divorce; Contempt; Habeas Corpus; Certiorari; Prohibition; Quo Warranto; Mandamus. By W. F. Bailey, Late Circuit Judge of Wisconsin, Author of "Master's Liability for Injuries to Servant," "The Law of Personal Injuries Relating to Master and Servant." In Two Volumes. Chicago: T. H. Flood & Co., 1899. Sheep, pp. lxxiv, 560. Price $8.00 Review will follow.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. APPEAL—Parties.—Garnishees, under the provisions of chapter 151 of the Session Laws of 1889, are necessary parties to proceedings in error the object of which is to reverse a judgment discharging them as such garnishees from liability to the plaintiff in the case.—TUTHILL v. MOULTON, Kan., 58 Pac. Rep. 1031.

2. APPEAL—Record—Evidence.—In an action for personal injuries, alleged error in directing a verdict for defendant because plaintiff's contributory negligence precludes a recovery will not be considered where the only evidence in the record is that bearing on the issue of contributory negligence, as all the evidence might disclose that the instruction could be sustained because of want of evidence of defendant's negligence.—HARRIS v. CLEVELAND, C., C. & ST. L. RY. CO., Ind., 55 N. E. Rep. 222.

3. ATTORNEY AND CLIENT — Disbarment — Fraud.—Where a firm of attorneys knowingly falsely informed a client that they had not collected an account placed in their hands for collection, it could make no difference, in proceedings for their disbarment for withholding the collection, whether it had been appropriated by one or both for partnership or personal expenses.—PEOPLE v. BETTS, Colo., 58 Pac. Rep. 1091.

4. BANKRUPTCY — Contested Petition — Proof of Insolvency.—On the trial of a petition in involuntary bankruptcy, on the issue of solvency, evidence of a letter written by the respondent, stating that he was unable to pay his debts, and calling a meeting of his creditors, for the purpose of inducing them to accept 30 per cent. of their claims, is *prima facie* proof of his insolvency, and sufficient to sustain a finding against him on that issue, unless overcome by countervailing proof.—IN RE LANGE, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 197.

5. BANKRUPTCY—Creditors—Representation by Attorney.—An attorney at law, retained generally to represent a creditor in bankruptcy proceedings, cannot cast the vote of such creditor in the election of a trustee at a creditors' meeting, without showing an express authorization thereto as attorney in fact.—IN RE BLANKFEIN, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 191.

6. BANKRUPTCY—Debts Released by Discharge—Alimony.—Alimony awarded to a divorced wife by the judgment of a court of competent jurisdiction, to be paid in fixed weekly installments, and overdue at the time the husband files his petition in voluntary bankruptcy, is not such a debt as will be released by his discharge; and therefore the wife will not be stayed, pending the bankruptcy proceedings, from pursuing appropriate remedies for its collection, except where a preference upon the assets of the bankrupt is sought.—IN RE ANDERSON, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 321.

7. BANKRUPTCY — Liens — Unrecorded Mortgage.—A mortgage made more than four months before the filing of a petition in bankruptcy against the mortgagor is not annulled by his adjudication thereon, although it was not recorded until within a month of the bankruptcy proceedings. But where the law of the State provides that such a mortgage shall not be valid as against any persons who became creditors of the mortgagor during the time between the execution and the recording of the mortgage, either by a new credit or the extension of a pre-existing indebtedness, the same rule will be applied in the bankruptcy proceedings.—

IN RE ADAMS, U. S. D. C., E. D. (Mich.), 97 Fed. Rep. 188.

8. BANKRUPTCY—Objection to Allowance of Claims—Estoppel.—Where judgment creditors caused execution to be levied on property of their debtor within two months before the filing of a petition in involuntary bankruptcy against him by other creditors, and, pending a contest over the adjudication in bankruptcy, it was agreed between the judgment creditors and the petitioning creditors that the sheriff should sell the property levied on, deduct the costs of sale from the proceeds, and hold the balance until further orders, and after the adjudication the sheriff paid such balance to the trustee in bankruptcy, and the judgment creditors, abandoning all claims to priority, proved their claims as unsecured, held, that the petitioning creditors would not be heard to insist that the costs of the executions should be refunded by the judgment creditors before they were entitled to participate in the fund, being bound by the agreement.—IN RE MOYER, U. S. D. C., E. D. (Penn.), 97 Fed. Rep. 324.

9. BANKRUPTCY—Opposition to Discharge—Concealment of Assets.—Where a debtor, within four months prior to filing his petition in bankruptcy, transfers real and personal property to his wife, without consideration, and with intent to defraud his creditors, and then states in his schedule that he has no property of any kind, he is guilty of knowingly and fraudulently concealing from his trustee property belonging to his estate in bankruptcy, and is not entitled to be discharged.—IN RE SKINNER, U. S. D. C., N. D. (Iowa), 97 Fed. Rep. 190.

10. BANKRUPTCY—Proof of Debt—Estoppel.—Where the vendor of goods brought an action of replevin in a State court, claiming a rescission of the sale on the ground of fraudulent representations by the vendee as to his solvency, and under the writ of replevin secured possession of part of the goods sold, and the vendee was adjudged bankrupt, and the vendor thereupon filed proofs of debt in the bankruptcy proceedings, claiming from the estate the difference between the original purchase price of the goods and the value of those recovered in replevin, but without abandoning or dismissing the proceedings in the State court, which remained pending and undetermined, held, that such creditor could not prove his claim, either in whole or in part, without first surrendering to the trustee in bankruptcy the goods returned under the writ of replevin, or the value thereof.—IN RE HEINSFURTER, U. S. D. C., S. D. (Iowa), 97 Fed. Rep. 198.

11. BANKRUPTCY—Right to Discharge—Misconduct of Agent.—Where a business belonging to a married woman is conducted wholly by her husband, to whom she confides its entire management, and he, without her knowledge or privity, fails to keep true books of account, and conceals property, with the design of deceiving and defrauding creditors, and the wife becomes bankrupt, she is not to be deprived of her right to a discharge by reason of the husband's misconduct, being herself guiltless of any actual fraudulent intent, and her negligence in relation to the business not being equivalent to fraud, for the purposes of a penal statute.—IN RE HYMAN, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 195.

12. BANKRUPTCY—Trustee—Appointment by Referee.—Where the creditors of a bankrupt are unable to elect a trustee, no sufficient majority agreeing upon any candidate, after two sessions held at the office of the referee for that purpose on successive days, and there appears to be immediate need of a trustee, it is within the authority of the referee to make the appointment; and an appointment so made will not be vacated by the judge if the person chosen is competent, impartial and otherwise suitable.—IN RE KUFFLER, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 187.

13. BANKRUPTCY—Wife of Bankrupt as Witness.—Where, by the law of the State in which the proceedings are had, a wife cannot be a witness for or against her husband, she cannot be required, in proceedings in bankruptcy against the husband, to testify concerning sums of money alleged to have been placed in her hands by the husband shortly before the institution of the bankruptcy proceedings, with a view to their recovery by the trustee.—IN RE MAYER, U. S. D. C., E. D. (Wis.), 97 Fed. Rep. 328.

14. BILLS AND NOTES—Action—Parties.—A plaintiff who brought suit upon a promissory note, the legal title to which was not in him when his petition was filed, could not maintain the action by proving that before trial he had procured an indorsement of the note to himself from the person in whom such title had vested at the time the action was begun.—BURCH V. DANIEL, Ga., 34 S. E. Rep. 310.

15. BILLS AND NOTES—Action—Proof of Execution.—A plea by a defendant that the note sued on "does not appear as it did when it was signed, having been altered by marking and scratching over the same with pen and ink," and that he did not execute the note "in the shape it now is," is not such a plea of *non est factum* or of alteration as to put on the plaintiff the burden of proving the execution of the note by the defendant.—MOZLEY V. REAGAN, Ga., 34 S. E. Rep. 310.

16. BOUNDARIES—Evidence—Declarations.—The declarations of ancient persons while in the possession of land owned by them, pointing out the boundaries on the land itself, and who are deceased at the time of the trial, are admissible evidence when nothing appears to show that they were interested in thus pointing out their boundaries.—WILSON V. ROWE, Me., 44 Atl. Rep. 615.

17. CARRIERS — Contractual Obligation — Insults to Passengers.—Where plaintiff entered defendant's street car, and paid her fare, and was insulted by the motorman, by indecent remarks made to her and concerning her, such conduct is a breach of the contractual duty owed plaintiff by defendant, and is actionable, though the defendant did not authorize or ratify such conduct, and was not negligent in selecting the motorman.—KNOXVILLE TRACTION CO. V. LANE, Tenn., 53 S. W. Rep. 557.

18. CARRIERS—Passenger.—In an action for carrying passenger beyond destination it appeared that plaintiff, of her own volition, returned to her destination on a freight train, while, by waiting an hour, she could have returned on a passenger train. Held, that evidence as to the unpleasant conditions on the freight train, and plaintiff's annoyance caused thereby, was not admissible.—ST. LOUIS, I. M. & S. RY. CO. V. POWER, Ark., 53 S. W. Rep. 572.

19. CARRIERS—Passengers—Negligence of Brakeman.—A railroad company is liable for the negligence of a brakeman, resulting in injury to a passenger, while carrying such passenger, a physically disabled person, from a train, which he did at the request of persons having the passenger in charge, though the latter and her attendants left the train at a point short of their destination by reason of the mistaken statement of the brakeman that it was necessary for them to change cars at that point.—INTERNATIONAL, ETC. RY. CO. V. ANDERSON, Tex., 53 S. W. Rep. 606.

20. CARRIERS OF PASSENGERS — Street Car—Negligence.—Plaintiff was injured in getting off a street car on which one man performed the services of both motorman and conductor. In the absence of a law or ordinance regulating the matter, held, whether or not in the particular instance an injury might have been averted if two men had been employed to perform such services is not the test of whether the street-railway company is guilty of negligence in failing to employ the second man, but the expense of employing the second man, the amount of traffic on the streets and on the cars, and the dangers to be encountered in operating the car over the particular route, should all be taken into consideration. Held, the burden was on the plaintiff to show that defendant was negligent in failing to employ a conductor or second man on the car.—PALMER V. WINONA RAILWAY & LIGHT CO., Minn., 80 N. W. Rep. 869.

21. CONTRACTS—Breach — Affirmance.—Suit for damages for breach of contract is an affirmance of it *in toto*. The contract cannot be affirmed in part and rescinded in part.—COLE v. SMITH, Colo., 58 Pac. Rep. 1086.

22. CONTRACT — Impeachment of Executed Agreement.—A written contract for the sale and purchase of property, which has been fully executed by the delivery of the property and the payment of the price in accordance with its terms, cannot be impeached and set aside by the seller, and an earlier contract between the parties for the sale of the same property for a greater price substituted and enforced, merely on allegations of an oral understanding between them that the second contract should be without legal effect, and that payment should be made in accordance with the first, neither fraud nor mistake being charged.—HOUSEKEEPER PUB. CO. v. SWIFT, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 290.

23. CONTRACT—Interpretation — Reasonable Time.—An agreement by one to whom a lien on premises is given, to secure the payment of a debt, to liquidate her claim from the rents of the premises, and not by a sale thereof, obligates her to refrain from enforcing the lien by a sale, only for a reasonable length of time.—ANDERSON v. WAINWRIGHT, Ark., 53 S. W. Rep. 566.

24. CONTRACT — Parties — Right to Enforce.—A contract to lend money to a corporation, made with stockholders who furnished the consideration, held to be a contract with them individually, for the breach of which they were entitled to sue.—KELLY v. FAHRNEY, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 176.

25. CONTRACTS—Sales—Agency.—A contract made by the acceptance of the terms of a letter, wherein the writer proposes to ship hops to another, obtained by the former from the growers, and to draw sight drafts therefor on the latter, and states that his "offers and your orders are good for 24 hours, unless otherwise stipulated," shows that the former is an independent dealer, and not the latter's agent to purchase hops.—SIMONDS v. WRIGHTMAN, Oreg., 58 Pac. Rep. 1100.

26. CONTRACT OF SALE—Joint Ownership.—A contract of sale made by and in the name of one of several persons who are joint owners of the property agreed to be sold, and which purports on its face and by its terms to be the contract only of the individual who negotiates the sale, will not be construed as a contract on the part of such vendor as agent for the others simply because he has represented to the buyer that he has full power and authority to sell the interests of the others in the property.—RAUDABAUGH v. HART, Ohio, 55 N. E. Rep. 214.

27. CONVERSION—What Constitutes.—Where defendant, through an agent, took possession of property, and sold it, and used the proceeds to pay an account against a third person in favor of a bank of which he was president, it is sufficient.—HORTON v. JACK, Cal., 58 Pac. Rep. 1051.

28. CORPORATION—De Facto Corporation.—A *de facto* corporation can be deprived of its franchise or property only in a direct proceeding by the State.—LOS ANGELES HOLINESS BAND v. SPIRES, Cal., 58 Pac. Rep. 1049.

29. CORPORATIONS—Dividends—Interest.—Dividends do not bear interest until there has been a demand.—COCHRAN v. MCGEE, Ky., 53 S. W. Rep. 519.

30. CORPORATIONS—Liability of Stockholders — Kansas Statute.—Under the constitution and statutes of Kansas subjecting stockholders in corporations to an additional liability in favor of creditors to the amount of their stock, and providing (Comp. Laws Kan. 1879, ch. 23, § 32), that a judgment creditor of the corporation, after an execution returned unsatisfied, "may proceed by action to charge the stockholders with the amount of his judgment," such an action is for the individual benefit of the creditor suing, and he may proceed at law against a stockholder in any court of general jurisdiction where personal service may be made on the defendant.—FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. MECHANICS' SAV. BANK, U. S. C. C. of App., Third Circuit, 97 Fed. Rep. 297.

31. COUNTIES—Exchange of Bonds — Commissions.—The issuance of new bonds by a county to one who, in consideration therefor, has redeemed an equal amount of old bonds with his own money, is not a receipt and disbursement of money by the county, entitling the treasurer to commissions.—FARMER v. ARKANSAS COUNTY, Tex., 53 S. W. Rep. 607.

32. COURTS—Case Made—Settlement and Signing.—A case made, under the provisions of the Code, cannot be settled and signed by the successor of a deceased judge who tried the cause.—PARRAULT v. MARSANT, Kan., 58 Pac. Rep. 1027.

33. COVENANTS—Breach — Damages.—The covenants of seisin and of the right to convey, and that the land is free from incumbrances, are broken as soon as the deed is executed, if the title be bad; and a cause of action accrues at once, and is barred within five years thereafter.—JEWETT v. FISHER, Kan., 58 Pac. Rep. 1023.

34. CRIMINAL EVIDENCE — Arson — Declarations—Threats.—It was error to admit in evidence, against one on trial for a criminal offense, a declaration made by his wife in his presence before the offense was committed,—the same being offered as tending to show a threat on his part,—when the language used by the wife was not affirmatively approved by him, and was not such as to call for a disclaimer by him of any criminal intent or purpose.—CHAPMAN v. STATE, Ga., 34 S. E. Rep. 369.

35. CRIMINAL EVIDENCE — Homicide—Dying Declarations.—When, in a prosecution for a homicide, dying declarations are sought to be admitted, the judge must first determine from preliminary evidence whether, *prima facie*, they were competent as such, and made under circumstances entitling them to admission; but, having been admitted, it is for the jury to finally pass on the question whether or not such declarations of the deceased were conscious utterances in the apprehension and immediate prospect of death. A charge which does not so instruct the jury, but may be so construed as that the jury will infer that they must take such admissions as a part of the evidence in the case without a qualification that they must finally determine whether such declarations were made, and if they were at a time when the deceased was in the article of death, and conscious of his condition, was error.—BUSH v. STATE, Ga., 34 S. E. Rep. 298.

36. CRIMINAL LAW—Appeal — Bill of Exceptions.—A prosecution for the violation of a municipal ordinance, punishable by fine or imprisonment, is a criminal case, within the meaning of the statute requiring that, "in all criminal cases, the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision."—BARNETT v. CITY OF ATLANTA, Ga., 34 S. E. Rep. 322.

37. CRIMINAL LAW—Arson — Accessory.—One may be an accessory before the fact to the offense of wilfully and maliciously setting fire to and attempting to burn a house which may be the subject-matter of the crime of arson.—HOWARD v. STATE, Ga., 34 S. E. Rep. 330.

38. CRIMINAL LAW—Assault with Intent to Kill.—One cannot legally be convicted of the offense of assault with intent to murder, alleged to have been committed with a pistol, upon proof which merely shows that he drew the weapon from his hip pocket, and, in consequence of its being caught in the lining of his coat, did not make any actual attempt to inflict with the pistol an injury upon the person alleged to have been assaulted.—BURTON v. STATE, Ga., 34 S. E. Rep. 286.

39. CRIMINAL LAW — Election — Second Trial.—The election by the prosecutor as to which transaction he will rely upon for conviction upon a criminal charge is made for that trial only, and does not limit the State to that particular transaction at a subsequent trial.—STATE v. PEAK, Kan., 58 Pac. Rep. 1034.

40. CRIMINAL LAW—False Pretenses.—False representations acted on by another, in consequence of

which he was cheated and defrauded, must, to be the basis of a prosecution for cheating and swindling, relate either to the present or to the past. A promise relating to the future cannot be the basis of a prosecution for this offense. But where there is both a false pretense and a promise, which acted together on the mind of the person defrauded and induced him to part with a thing of value, and he would not have done so on the promise without the pretense, such a pretense, if false, is sufficient to support a conviction for being a common cheat and swindler.—HOLTON v. STATE, Ga., 34 S. E. Rep. 858.

41. CRIMINAL LAW—Homicide—Aider and Abettor.—A charge that if a mother killed her child with malice aforethought and a formed design to kill, and defendant was present, and knew of such unlawful intent, and aided in the killing, then defendant is guilty of murder in the first degree, is not erroneous as allowing defendant to be convicted of murder in the first degree if he had an intent of a less degree than the mother, when the court subsequently applies said charge to the facts in the case, and submits murder in the second degree and manslaughter to the jury.—RED v. STATE, Tex., 53 S. W. Rep. 618.

42. CRIMINAL LAW—Rape.—Where, on a trial for rape, the prosecutrix testifies to acts of defendants tending to show the commission of the offense charged, and her evidence on material points is corroborated, the trial court is warranted in submitting the case to the jury.—STATE v. BLYTHE, Utah, 58 Pac. Rep. 1108.

43. CRIMINAL LAW—Theft—Good Faith.—Theft being the "fraudulent taking" of personalty, one who takes property under the belief that he has a right to take it and that it is his, is not guilty thereof, though he takes it from the possession of an officer who has levied thereon as the property of another.—BULLARD v. STATE, Tex., 53 S. W. Rep. 636.

44. CRIMINAL PRACTICE—Indictment—Forgery.—Under Rev. Code, ch. 129, § 8, which provides that if any person, with intent to defraud, shall forge or counterfeit the hand of any person, he shall be guilty of forgery, an indictment which alleges that defendant "did feloniously counterfeit" the hand of another, without alleging an intent to defraud, is fatally defective.—STATE v. HEGEMAN, Del., 44 Atl. Rep. 623.

45. DAMAGES—Personal Injuries.—Mental pain and suffering which are the natural and proximate results of a physical injury, or an element of or necessary consequence of the physical pain caused thereby, can be recovered under the general allegations of damages for such injury, and need not be specially pleaded.—FT. SCOTT, W. & W. RY. CO. v. LIGHTBURN, Kan., 58 Pac. Rep. 1033.

46. DEATH BY WRONGFUL ACT—Survival—Minnesota Statute. Gen. St. Minn. 1894, § 5912, which provides that "a cause of action arising out of an injury to the person dies with the person of either party except as provided in the next section," applies to all causes of action, whether founded on contract or tort; and under it the personal representative of a person whose death was caused by an injury received while a passenger on a street railroad cannot maintain an action for breach of the contract for safe carriage, counting on the expense and loss of time caused the decedent prior to his death by the injury as the damages resulting from such breach, where the suit is not brought in accordance with the provisions of section 5913.—WEBBER v. ST. PAUL CITY RY. CO., U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 140.

47. DEEDS—Covenant by Grantor to Fence Right of Way of Railroad.—A covenant in a deed executed to a railroad company agreeing to build and maintain a fence on the side of the railroad through the premises, or not to hold the railroad responsible for any damages done to stock does not run with the land, where the fence was not *in esse* when the deed was executed, but is a condition personal to the grantors, and hence does not absolve the company from liability for injury to stock of a tenant or a successor in interest of the grantors.—BROWN v. SOUTHERN PAC. RY. CO., Oreg., 58 Pac. Rep. 1104.

48. DEED—Insertion in Deed and Record—Ratification by Grantor.—Where a grantor ratifies an insertion in the deed, and on the record thereof, so as to convey land not included in the original description, even if he did not consent thereto, he and those claiming under him are bound thereby.—CHEZUM v. MCBRIDE, Wash., 58 Pac. Rep. 1067.

49. ELECTIONS—Contest—Removal of County Seat.—The validity of an election held for the removal of a county seat cannot be contested upon the ground that the county judge had no authority to order the election because the applicants for the election who were not disqualified were less than the number required by statute.—SCARBOROUGH v. EUBANK, Tex., 53 S. W. Rep. 578.

50. ESTATES—Merger—Evidence.—Generally, if two unequal estates are vested in the same party at the one time, and there is no intervening estate, the inferior is merged in the superior.—OAK CREEK VAL. BANK v. HELMER, Neb., 80 N. W. Rep. 891.

51. ESTOPPEL BY PLEADING.—A party, having once solemnly admitted a fact, and made it a part of the record by his pleadings, cannot, after such admission by merely withdrawing the paper containing the admission from the files of the court, deny such admission, but is estopped thereby.—MCDONALD v. GRICE, Kan., 58 Pac. Rep. 1035.

52. EVIDENCE—Injury to Employee.—An admission by a person, tending to show that a physical injury received by him, and which subsequently resulted in his death, was caused by an accident, and not by the negligence of a railroad company of which he was an employee, was admissible in evidence for the defendant on the trial of an action for the homicide of such person, brought by his widow against that company.—GEORGIA RAILROAD & BANKING CO. v. FITZGERALD, Ga., 34 S. E. Rep. 816.

53. EVIDENCE—Parol Evidence—Freight Shipment.—Bills of lading belong in the class of written contracts, and come within the rule which prohibits the introduction of parol evidence to contradict or vary their terms.—MCELVEEN v. SOUTHERN RY. CO., Ga., 34 S. E. Rep. 281.

54. EVIDENCE—Real Estate—Market Value.—In determining the value of real estate there are two well recognized principles: The value may be shown by the testimony of experts, or by that of ordinary witnesses, who have special knowledge of the property. The value of lands is not a question of science or skill upon which only experts can express an opinion. While it is always proper, when practicable, to show the market value of land in cases like this, yet, if there have been few or no sales of like property in that vicinity at or about the time in question, then its reasonable value can be determined by considering all the facts upon which values are usually predicated.—WICKSTRUM v. CARTER, Kan., 58 Pac. Rep. 1020.

55. EXECUTION—Exemptions.—One who seeks, under the constitution of 1877, to have an exemption on the ground that he or she has "the care and support of dependent females," must apply for the exemption out of his or her own property. Neither a wife nor a widow can, under this clause of the constitution, exempt property belonging to the husband or his estate. (a) Were it otherwise, there can be no dependency on a person who is dead, and the homestead would not survive for a beneficiary coming under this clause of the constitution after the applicant for the homestead had ceased to live.—SUTTON v. ROSSER, Ga., 34 S. E. Rep. 346.

56. EXECUTION—Sale—Notice.—Where a sheriff's deed shows on its face that notice of sale was not given in compliance with Sand. & H. Dig. § 3095, it is void and confers no title.—RUSSELL v. WILLIAMSON, Ark., 53 S. W. Rep. 561.

57. EXECUTION—Validity—Seal.—An execution issued out of the district court without the use of the seal of said court is void, and a nullity, and a sheriff can secure no right thereunder.—FRANKHOUSER v. DE WITT, Kan., 58 Pac. Rep. 1027.

58. EXECUTORS AND ADMINISTRATORS—Application of Proceeds.—Where property of an estate, covered by a lien, is sold for less than sufficient to pay the lien and costs, it is error to apply the entire proceeds to the lien, and include the costs in the costs of administration, to the prejudice of other lien creditors. The costs of sale should first be paid from the proceeds.—GREER v. RILEY'S ESTATE, Tex., 53 S. W. Rep. 578.

59. FEDERAL COURTS—Jurisdiction—Coupons from Municipal Bonds.—The jurisdiction of a federal court to hear and determine an action brought by a citizen of another State on coupons from county bonds, payable to bearer, and which were purchased by plaintiff after they were detached, is not affected by the fact that the bonds themselves are payable to persons who are citizens of the State of which defendant is a county.—REYNOLDS v. LYON COUNTY, IOWA, U. S. C. C., N. D. (Iowa), 97 Fed. Rep. 155.

60. FEDERAL COURTS—Jurisdiction—Suit by State Railroad Commissioners.—A suit brought by the railroad commissioners of Missouri, under the statutes of the State, against a railroad company, to enforce obedience to an order of the commission fixing rates, is not one in effect on behalf of the State, or in which the State is the real party in interest, so as to prevent its removal from a State to a federal court by the defendant, where the statutory grounds for removal exist. The real parties in interest in such a suit are the carrier and its patrons, and the State is interested only in a governmental sense.—HICKMAN v. MISSOURI, K. & T. RY. CO., U. S. C. C., W. D. (Mo.), 97 Fed. Rep. 113.

61. FRAUDS, STATUTE OF — Parol Contract.—A parol agreement, terminable at any time upon notice by either party, that a fire insurance policy shall be renewed from year to year, is not void under the provisions of the statute of frauds.—PHŒNIX INS. CO. OF HARTFORD, CONN., v. IRELAND, Kan., 58 Pac. Rep. 1024.

62. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—Wherever the leading purpose of a person who agrees to pay the debt of another is to gain some advantage or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made upon sufficient consideration, it will be valid, although not in writing, and the contract is not within the statute of frauds.—TRULOCK v. BLAIR, Okla., 58 Pac. Rep. 1097.

63. FRAUDULENT CONVEYANCES—Actions to Set Aside—Burden of Proof.—In an action to set aside a transfer of personal property as fraudulent as to creditors, the burden of proof is on plaintiff to show that defendant sold the property with a fraudulent intent, and that the transferee paid no consideration therefor, or, if he paid a valuable consideration therefor, that he purchased with knowledge of the fraudulent intent of defendant.—AMERICAN VARNISH CO. v. REED, Ind., 55 N. E. Rep. 224.

64. HOMESTEAD—Declaration of Claimant.—The right of a claimant to select a homestead under Civ. Code, tit. 5, § 1237, *et seq.*, providing for the reservation of homesteads to be exempt from execution at forced sale, must appear upon the face of his declaration, and the omission to show such right cannot be supplied by extraneous evidence.—REID v. ENGLEHART-DAVIDSON MERCANTILE CO., Cal., 58 Pac. Rep. 1063.

65. HOMESTEAD — Exemption.—The fact that land sold by a debtor did not constitute his homestead does not deprive him of the right to hold the purchase price thereof as a part of his exemption.—WHEELER v. EATMAN, Ark., 53 S. W. Rep. 571.

66. HUSBAND AND WIFE—Presumption that Wife Paid for Land with Husband's Money.—The burden is on the wife to rebut the presumption that money used in paying for land conveyed to her belonged to the husband.—EDELMUTH v. WYBRANT, Ky., 53 S. W. Rep. 528.

67. INJUNCTION—Against Execution of State Court.—An order enjoining a sheriff from proceeding with the collection of an execution lawfully issued to him in pursuance of a decree is within the prohibition of Rev. St. § 720, against an injunction by a court of the United States to stay any proceeding in a State court.—LEATHE v. THOMAS, U. S. C. C. of App., Seventh Circuit, 97 Fed. Rep. 136.

68. INSURANCE — Assignment of Policy.—An assignment of an insurance policy is not bad because the authority and genuineness of the signature of the notary before whom it was acknowledged was not attested by a clerk of a court of record, where the policy provided only that the assignment should be executed in duplicate, and both copies should be sent to the home office of the insurer.—BURGES v. NEW YORK LIFE INS. CO., Tex., 53 S. W. Rep. 602.

69. JUDGMENT—Dormancy — Rights of Minor.—The fact that one in whose favor a judgment has been obtained is a minor does not prevent the dormancy statute from running against such judgment.—WILLIAMS v. MERRITT, Ga., 34 S. E. Rep. 312.

70. JUDGMENT—Satisfaction—Execution Sale.—Where land of judgment debtors is sold to a creditor for a sum sufficient to satisfy the judgment, and the execution is returned, and the sale confirmed, at the request of the judgment creditor, and a sheriff's deed executed, there is full satisfaction of the judgment as to a judgment debtor, whose liability in the judgment is that of a surety, though there may be an agreement between the creditor and the debtor whose land is sold that the deed shall be a mortgage.—HANNA v. SAVAGE, Wash. 58 Pac. Rep. 1069.

71. JUDGMENT AGAINST ONE OF JOINT DEFENDANTS—Several Contract.—The rule that it is improper for a court to render a several judgment against one or more defendants, leaving the action to proceed against the others, in actions founded upon joint contracts wherein the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action, has no application in favor of a defendant who pleads that he is surety only, and has been released from liability on the contract by reason of an extension of time of payment without his consent, the plaintiff in his reply admitting such suretyship. As between parties so pleading, the contract is, in legal effect, several, although joint in form.—MCCOY v. JONES, Ohio, 55 N. E. Rep. 219.

72. LIBEL AND SLANDER — Words Charging Misrepresentations.—Words charging that plaintiff made false statements, and misrepresented a lot he had traded to defendant, are not actionable *per se*.—WINSETTE v. HUNT, Ky., 53 S. W. Rep. 522.

73 LIFE INSURANCE—Application—Fraud of Agent.—Where insured, a foreigner, imperfectly acquainted with the English language, and unacquainted with the terminology of insurance, signed a blank application for insurance, and delivered it to an agent of the company on the latter's agreement to fill it in in accordance with an oral agreement with him, the agent acted for the company, and fraud on his part in filling in the application will be attributed to the company.—LA MARCHE v. NEW YORK LIFE INS. CO., Cal., 58 Pac. Rep. 1053.

74. LIFE INSURANCE—Assignment—Rights of Assignee.—A creditor of a person having his life insured, who takes an assignment of the policy to secure his debt, is only entitled to retain after collection of the policy such an amount as is sufficient to pay the debt together with all advances the creditor has made to keep the policy in force. If a balance remains, the payees named in the policy are entitled to receive it. Accordingly, where the amount of the debt is in issue, it must be ascertained, like any other question of fact by the verdict of a jury.—MORRIS v. GEORGIA LOAN, SAVINGS & BANKING CO., Ga., 34 S. E. Rep. 378.

75. LIFE INSURANCE—Insurable Interest of Beneficiary.—While a valid contract of insurance cannot lawfully be taken on the life of another by one who has no insurable interest therein, because it contravenes public policy, yet, as one has an insurable interest in his own life, he may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote. Such a contract cannot be defeated because of the want of insurable interest in the beneficiary, when it appears that the person whose life is insured acted for himself, at his own expense, and in good faith, to promote the interest of the beneficiary, in taking out the policy. A contract so entered into is in no sense a wagering or speculative one. —UNION FRATERNAL LEAGUE v. WALTON, Ga., 34 S. E. Rep. 817.

76. LIFE INSURANCE — Place of Contract.—Where an insurance company in the State of New York issued a policy upon an application made at, and forwarded from, the company's office in the State of Washington, and proof of death and payment thereunder were to be made to and by the New York office, the policy is a New York contract.—MUTUAL LIFE INS. CO. OF NEW YORK v. HILL, U. S. C. C. of App., Ninth Circuit, 97 Fed. Rep. 263.

77. LIMITATIONS—Removal of Bar — New Promise.—Unless a debt barred by the statute is unqualifiedly acknowledged, or there is an express promise to pay it, it cannot be recovered; and loose and general expressions respecting its acknowledgment, which are merely casual, are insufficient to remove the bar.—THOMAS v. CAREY, Colo., 58 Pac. Rep. 1093.

78. LIMITATION OF ACTIONS—Action on a Parol Agreement.—A parol agreement by the purchaser of land at a sale made in a bankruptcy proceeding to permit the bankrupt to redeem cannot be enforced after the lapse of five years.—BUCKLER'S ADMX. v. ROGERS, Ky., 53 S. W. Rep. 529.

79. MARRIAGE — Validity.—Section 4769, Gen. St. 1894, relating to age of competency for contracting marriage, construed and held, that the marriage of a person who has not reached the age of statutory competency, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of consent, to be exercised at any time before reaching such age, or afterwards if the parties have not voluntarily cohabited after reaching such age.—STATE v. LOWELL, Minn., 80 N. W. Rep. 877.

80. MASTER AND SERVANT — Appliances — Duties and Liability—Action for Defect. — Workmen are bound to see to the safety of appliances which they construct for their own convenience, and the duty cannot be shifted to their employer, and, even if one uses such an appliance constructed by his fellow workmen, he is still bound to see that it is safe before using it, and, if he does not, it is his own negligence.—DONOVAN v. HARLAN & HOLLINGSWORTH CO., Dela., 44 Atl. Rep. 619.

81. MASTER AND SERVANT — Railroads—Fellow-Servants.—A yardmaster of a railroad, who is made responsible for the condition of the yards at the terminus of a division, directs the incoming and starting of trains, and is authorized to employ and discharge men, but who is subject to the orders of the superintendent and train master, is a fellow-servant of the foreman of a switching gang employed in the yard under him.—THOMAS v. CINCINNATI, N. O. & T. P. RY. CO., U. S. C. C., D. (Ky.), 97 Fed. Rep. 245.

82. MECHANICS' LIENS—Knowledge of Owner of Land —Notice.—A person who has leased machinery to persons in possession of land, under a contract to purchase the same, and which the latter have affixed to the soil, is not such an owner or person as is contemplated by Code Civ. Proc. § 1192, which provides that where work is done on land with the knowledge of the owner, which work would entitle the person performing it to a mechanic's lien, the work will be deemed to have been performed at the instance of the owner, unless such owner within three days give notice, by posting, that he will not be responsible, and need not give such notice to prevent a miner's lien attaching to the machinery.—JORDAN v. MYRES, Cal., 58 Pac. Rep. 1061.

83. MORTGAGES—Absolute Conveyances.—A debtor may in this State execute an absolute deed to his creditor for the purpose of securing a debt, without receiving from the creditor a bond to reconvey the property described in the deed upon payment of the debt.—JEWELL v. WALKER, Ga., 34 S. E. Rep. 837.

84. MORTGAGES—Foreclosure—Pleading.—In an action upon promissory notes and for the foreclosure of a real-estate mortgage, it is sufficient for the party to set out as exhibits the notes, together with all the credits and indorsements as they may appear thereon; and, where this is done, motion that plaintiff be required to make his petition more definite and certain, by setting out other credits, or by setting out the same more in detail, is properly overruled.—QUINT v. FIRST NAT. BANK OF HAYS CITY, Kan., 58 Pac. Rep. 1010.

85. MORTGAGES—Foreclosure for Default in Interest. —Under Civ. Code, § 1642, providing that several contracts relating to the same matter, and between the same parties, and made as parts of substantially one contract, must be taken together, a note and a mortgage given to secure the same should be construed together.—PHELPS v. MAYERS, Cal., 58 Pac. Rep. 1048.

86. MORTGAGES—Right to Possession by Mortgagee.—The mortgagee has no right to possession of the mortgaged premises prior to foreclosure and sale, in the absence of a stipulation in the mortgage to that effect. —STATE v. SUPERIOR COURT OF KITTITAS COUNTY, Wash., 58 Pac. Rep. 1065.

87. MUNICIPAL BONDS—Conditions Precedent to Issuance.—The recitals of officers who are invested with authority to determine when conditions precedent to the issue of negotiable bonds are complied with, and with power to issue them on the fulfillment of such conditions, that they have been issued "in pursuance of," or "in conformity with," or "by virtue of" the statute which authorizes their issue under the prescribed conditions, preclude inquiry, as against innocent purchasers for value of the bonds containing such recitals, as to whether or not the precedent conditions had been performed when they were issued.—GRATTAN TP. v. CHILTON, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 145.

88. MUNICIPAL BONDS—Exceeding Limit of Indebtedness.—Where an issue of negotiable bonds by a county does not in itself exceed the limit of indebtedness which the county can legally contract, and the bonds recite that they are issued for the purpose of funding outstanding indebtedness of the county, and also recite the statutes under which they are issued, and which authorize their issuance for such purpose, there is nothing on the face of such bonds to charge a purchaser with notice that their issuance will increase the indebtedness of the county beyond the constitutional limit, and one purchasing such bonds in good faith from the county, for full value, is an innocent purchaser, entitled to rely on the recitals therein, and to enforce them against the county, at least to the amount for which the county could legally contract indebtedness at the time of their issuance.—KEENE FIVE CENT SAV. BANK v. LYON COUNTY, U. S. C. C., N. D. (Iowa), 97 Fed. Rep. 159.

89. MUNICIPAL BONDS—Rights of Transferee from Bona Fide Purchaser.—A transferee from a *bona fide* purchaser of negotiable municipal bonds takes all the rights of the transferr , and may invoke every presumption and estoppe from their recitals to sustain their validity that such transferror might, although he takes them as a gift or advancement, after maturity, and with notice of alleged defenses.—BOARD OF COMMRS. OF LAKE COUNTY, COLO., v. SUTLIFF, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 270.

90. MUNICIPAL CORPORATIONS—Change of Grade—Interest on Damages.—In an action for damages caused by change of grade, plaintiffs should be allowed inter-

est from the time their damages were liquidated to that when they are put into formal judgment, where there are no delays attributable to plaintiffs' fault.—NEW HAVEN STEAM SAWMILL CO. v. CITY OF NEW HAVEN, Conn., 44 Atl. Rep. 609.

91. MUNICIPAL CORPORATIONS—Liability for Services.—Plaintiff cannot recover of defendant city for services rendered as jail guard, in the absence of an allegation that he was appointed by the city, or that it ever agreed to pay him any salary for the alleged services, or that he was acting pursuant to any contract made with the city.—CITY OF COVINGTON v. ELLIOTT, Ky., 53 S. W. Rep. 526.

92. MUNICIPAL CORPORATIONS—Ordinance—Construction.—An ordinance requiring persons "riding or driving" to check up or halt for pedestrians, if necessary, on approaching alley or street crossings, does not apply to street cars.—CITIZENS' RY. CO. v. FORD, Tex., 53 S. W. Rep. 575.

93. MUNICIPAL CORPORATIONS—Prisons—Erection and Maintenance.—The erection of a prison by the municipal authorities of a city, within the limits thereof, is not an invasion of the property rights of the owner of adjacent lands, and therefore not the foundation of an action for damages against the city.—LONG v. CITY OF ELBERTON, Ga., 34 S. E. Rep. 333.

94. MUNICIPAL CORPORATIONS—Public Parks—Rights of Taxpayer in.—A resident and taxpayer of a city or town may maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park, and has since been maintained as such.—DAVENPORT v. BUFFINGTON, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 234.

95. MUNICIPAL CORPORATIONS—"Sunday Ordinance"—Validity.—An ordinance prohibiting any person, firm, or corporation to keep open, within the limits of the city, any clothing or other certain enumerated stores, or to expose or offer for sale, or give away, within the city any clothing or other articles of merchandise mentioned, on Sunday, in as far as it affects dealers in clothing, is void, as class legislation.—CITY OF DENVER v. BACH, Colo., 58 Pac. Rep. 1089.

96. NEGLIGENCE — Natural Gas — Pleading.—A complaint against a natural gas company for negligently increasing the pressure, and setting fire to plaintiff's house, showed that plaintiff had control of all the gas appliances within her house, except the mixer; that the company changed, over plaintiff's protest, a No. 5 for a No. 7 mixer, but did not show that it was legally bound to furnish such a mixer as the consumer wished, or that the fire might not have occurred with either mixer; that the gas passed through the mixer into a burner, and in front of the mixer was a valve regulating the flow, and used to turn off the gas, but that the amount of the flow depended on the pressure, which was regulated by the company. It averred, further, that plaintiff had "carefully adjusted the valve to suit the pressure before her absence;" indicating that she knew the pressure was not uniform, and that it was controlled by the valve. Held not to show negligence of the company.—IBACH v. HUNTINGTON LIGHT & FUEL CO., Ind., 55 N. E. Rep. 249.

97. NEGLIGENCE — Railroads — Contributory Negligence.—Failure of one approaching a railroad crossing to look and listen is not negligence, *per se*; but it is for the jury to determine, from all the attending circumstances, whether he used such care and prudence as a man of ordinary prudence would have exercised under similar circumstances.—GALVESTON, ETC., RY. CO. v. HARRIS, Tex., 53 S. W. Rep. 599.

98. NUISANCE — House of Ill Fame — Abatement.—A court of equity has jurisdiction to abate as a nuisance, a house of ill fame, when the petitioner shows that he has been especially and particularly injured in the use and enjoyment of his property by its existence.—WEAKLEY v. PAGE, Tenn., 53 S. W. Rep. 551.

99. PRINCIPAL AND AGENT—Brokers—Termination of Agency by Principal.—A broker's agency for the sale of property having no limit as to time may be terminated at any time by the principal, subject to the ordinary requirements of good faith.—REES v. PELLOW, U. S. C. C. of App., Sixth Circuit, 97 Fed. Rep. 167.

100. PRINCIPAL AND AGENT — Indorsement of Forged Check by Agent.—An agent of a corporation, duly authorized to indorse checks in its behalf for deposit may bind it by such an indorsement to the payment of a check purporting to have been drawn by the corporation to its own order, although such check was in fact forged by the agent himself.—WARREN-SCHARF ASPHALT PAV. CO. v. COMMERCIAL NAT. BANK OF DETROIT, MICH., U. S. C. C. of App., Sixth Circuit, 97 Fed. Rep. 181.

101. PRINCIPAL AND AGENT—Powers of Agent—Sales Agent.—An agent for the sale of goods, with private limitations and restrictions imposed upon him by his employer, must nevertheless be regarded as a general agent, as to third parties with whom he deals, without notice of the restrictions on his authority; and, when his principal accepts a contract made within the apparent scope of the agent's powers, the principal is bound by all the conditions of such contract, and a failure to comply therewith will render such principal liable for damages.—SMITH v. DROUBAY, Utah, 58 Pac. Rep. 1112.

102. PRINCIPAL AND AGENT—Transfer of Title.—The mere taking of a money judgment by a principal against his agent for the value of goods wrongfully withheld by the latter does not alone operate to invest the agent with the title to the property so withheld. Payment of the judgment is necessary.—GILMAN v. TOWNSHIP OF GILBY, N. Dak., 80 N. W. Rep. 889.

103. PRINCIPAL AND SURETY — Action Between Co-Sureties.—In an action by a surety on a bond against a co-surety to recover for money paid out thereon, where plaintiff claims that he signed the bond under an agreement with defendant that the latter should hold him harmless against loss by reason thereof, evidence that defendant, at the time he was endeavoring to procure the bond, solicited another to act as surety, under an agreement to save him harmless, is inadmissible.—STUART v. KOHLBERG, Tex., 53 S. W. Rep. 596.

104. PRINCIPAL AND SURETY — Note—Evidence.—Presumptively, one who signed as surety a promissory note, which had been previously signed by two other persons apparently as joint principals, undertook to contract as surety for both of these persons; and the burden of showing that one of them was himself a mere surety for the other, and that the last signer so knew at the time of signing the paper, was on him who asserted that such was the fact.—PIRKLE v. CHAMBLEE, Ga., 34 S. E. Rep. 276.

105. PROHIBITION—When Lies.—Conceding that the court erred in adjudging service of original process sufficient in an action where the court had jurisdiction of the subject-matter, it is error occurring in the progress of the cause leading up to a final judgment on an appeal from which it may be reviewed, and hence prohibition based on such error will not lie against proceeding further in the action.—STATE v. BENSON, Wash., 58 Pac. Rep. 1066.

106. RAILROAD COMPANY — Action Against—Jurisdiction.—The right of a citizen of another State to come into the courts of the State to enforce against a railway incorporated in the State a liability of a transitory nature, arising wholly in such other State, cannot be defeated by showing that a remedy existed in the other State.—SORKIN v. HOUSTON, E. & W. T. RY. CO., Tex., 53 S. W. Rep. 608.

107. RAILROAD COMPANY—Use of Track in Common.—Where a railroad company leased to another company the right to use a portion of its track, and thereafter each company ran its trains over such track, in charge of its own employees, although they united in employing a joint superintendent and train dispatchers, the use by each was in common with the other, and not a

joint use, and each was bound to the use of due care to avoid injury to the trains of the other, and liable to the other for such an injury resulting from the negligence of its servants. Such duty and liability also rested upon a receiver operating the trains of one of the companies under a continuation of the agreement. —CENTRAL TRUST CO. OF NEW YORK v. DENVER & R. G. CO., U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 229.

108. RECEIVERS—Assets—Priorities.—A party upon whose application a receiver is appointed in a civil case has no greater interest in the proceeds of such receivership than he would have had if the receiver had been appointed upon the application of any one of the other litigants in the action.—JACKSON v. KING, Kan., 58 Pac. Rep. 1013.

109. RELEASE—Validity.—The rule requiring the return of the consideration for a contract releasing a claim for damages before it can be avoided by the maker does not apply where he is deceived into signing a contract different from the contract which he understands he is executing.—MEYER v. HAAS, Cal., 58 Pac. Rep. 1042.

110. RES JUDICATA.—The due and unresisted foreclosure of a chattel mortgage, followed by a regular sale of the mortgaged property under the mortgage execution, concludes the mortgagor, as to the property sold, from setting up any defenses, including usury, which he might have set up by counter affidavit; and is also binding upon him as the head of the family, so as to estop him, as such, from setting up that a waiver of homestead contained in the mortgage was void because of alleged usury in the debt it was given to secure.—BANK OF FORSYTH v. GAMMAGE, Ga., 34 S. E. Rep. 307.

111. SALES — Warranty — Conclusiveness. —Where a written contract for the sale of machinery stipulates what the liability of the seller shall be in case any part of the machinery fails to work satisfactorily, the writing must control, in the absence of fraud or mistake. —O'NEAL v. RUMLEY CO., Ky., 53 S. W. Rep. 521.

112. SCHOOL DISTRICTS—Trust—Conveyance of Land. —A school district, pending foreclosure of its mortgage on an opera house, agreed with a stockholder of the opera house company, who desired to obtain the sole ownership of the property, to purchase the property at the sale and convey it to him, taking part cash and a mortgage for the balance, all of which was done. Held, that the school district acted as trustee for the stockholder, and its action was not a sale of land, within Act April 1, 1891, requiring all sales of land by the school district to be at auction, to the highest bidder, after notice, etc.—DU VAL v. SCHOOL DIST. OF FT. SMITH, Ark., 53 S. W. Rep. 562.

113. TRESPASS—Liability for Acts of Agent.—Defendant is liable for the acts of one who, in the presence of its agent and by his co-operation, took from plaintiff's house, by force, a sewing machine which defendant had sold to plaintiffs; defendant having retained the fruits of his acts.—SINGER MFG. CO. v. STEPHENS, Ky., 53 S. W. Rep. 525.

114. TRESPASS ON PARTNERSHIP PROPERTY—Partner's Right to Sue.—An action for a trespass on partnership property may be maintained by one partner, and an objection for the nonjoinder of his co-partners can only be taken by plea in abatement, or by way of apportionment of the damages on the trial.—CARLISLE v. MCALESTER, I. T., 53 S. W. Rep. 531.

115. TRUSTS—Association for Trade—Perpetuities.—An association formed to rent and sell lands, and distribute the income as fast as it accrues, created a trust in which the trustees held subject to the control of the directors of the association. The shareholders remained the absolute owners of the equitable interests, with unlimited power to sell or transfer their interests, which were subject to their debts and to the laws governing ordinary property, and were not controlled in any manner by the declaration creating the trust. Held, that such a trust is not within the rule against perpetuities, though, by the terms creating it, it need not necessarily be terminated within the lives in being at the creation of the trust and 21 years.—HOWE v. MORSE, Mass., 55 N. E. Rep. 213.

116. TRUST — Mortgage — Secret Trust — Estoppel.—While, as to lands purchased by a husband with funds belonging to his wife, to which he took titles in his own name, a resulting trust immediately arises in favor of the wife, she cannot assert ownership thereof as against a third person; who, in ignorance and without notice of her secret equity, and on the faith of the husband's apparent title, makes to him in good faith a loan secured by a mortgage covering the lands so held in trust. Under such circumstances, the mortgagee, to the extent of his interest in the lands mortgaged, stands upon the same footing as *bona fide* purchaser without notice of the trust.—PARKER v. BARNESVILLE SAV. BANK, Ga., 34 S. E. Rep. 865.

117. VENDOR AND PURCHASER—Performance of Contract.—A vendee in possession and enjoyment of the land conveyed cannot continue therein, and refuse to pay the balance of the price, because of a judgment lien after a deposit in court of a sum sufficient to remove the same, and because of a dedication by the vendor of an inconsiderable part of the land sold, which in no way affects the use and enjoyment of the residue.—FLORENCE OIL & REFINING CO. v. MCCANDLESS, Colo., 58 Pac. Rep. 1084.

118. WATERS—Appropriation of Subsurface Waters of Stream.—One may, by appropriate works, develop and secure to useful purposes the subsurface flow of a stream, and become, with due regard to the rights of others in the stream, a legal appropriator of the waters thereby.—VINELAND IRR. DIST. v. AZUSA IRR. CO., Cal., 58 Pac. Rep. 1057.

119. WILLS—Contest—Instructions to Jury—Burden of Proof as to Testator's Sanity.—Where a will is not inconsistent in its structure, language or details, and not irrational in its provisions, the burden of proof is on the contestants to show that the testator was of unsound mind; and it is error to require the jury, in order to find for the will, to find affirmatively that testator was of sound mind.—BOONE v. RITCHIE, Ky., 53 S. W. Rep. 518.

120. WILLS—Mental Capacity to Revoke.—Declarations of the testator as to transactions concerning his will and disposition of his property, made during a time he was claimed to have destroyed his will, are admissible to prove the state of testator's mind when it was contended that he had not mental capacity to revoke his will.—MCINTOSH v. MOORE, Tex., 53 S. W. Rep. 611.

121. WILLS—Powers of Executrix. — When, by the terms of a will, real and personal property is given to the wife for life, with remainder to the children of the testator, a power conferred on the executrix, who was the wife of the testator, to sell any or all of the property devised, and reinvest the proceeds, expressed in language which plainly and unequivocally limits the purpose for which any sale can be made to that of reinvestment only, does not, notwithstanding the will may have contained broad and liberal provisions as to the manner in which this power may be exercised, empower the executrix to mortgage the property devised, nor to convey the title of such property as security for a debt created by her.—MCMILLAN v. COX, Ga., 34 S. E. Rep. 341.

122. WITNESS—Competency.—In actions, under article 28, of the Code, for alimony without divorce, the wife is not a competent witness in her own behalf.—SELDERS v. SELDERS, Kan., 58 Pac. Rep. 1038.

123. WITNESS—Competency.—The court properly refuses to charge that a witness is incompetent, and leaves his credibility to the jury, where defendant does not object to his testifying in the first instance, and offer the record of his conviction as proof of his incompetency, but in examining the witness he states the fact of his previous conviction.—BROWN v. STATE, Tex., 53 S. W. Rep. 699.